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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 560

EARLE W. HILTON, PETITIONER,

vs.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, FRANCES PERKINS, HARRY B. MITCHELL AND ARTHUR FLEMMING, MEMBERS OF THE CIVIL SERVICE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JANUARY 30, 1948.

CERTIORARI GRANTED MARCH 8, 1948.

APPENDIX

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9554.

EARLE W. HILTON, *Appellant*,

v.

JAMES FORRESTAL, Secretary of the Navy, and FRANCES PERKINS, HARRY B. MITCHELL, ARTHUR FLEMMING, Members of the Civil Service Commission, *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

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1 Filed Nov 19 1946

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action, File Number 37784

EARLE W. HILTON, No. 14 Third St., Naval Base, Charleston, South Carolina, *Plaintiff*,

v.

JAMES FORRESTAL, Secretary of the Navy, and FRANCES PERKINS, LUCILLE FOSTER MCMILLIN, ARTHUR FLEMMING, Members of the Civil Service Commission, *Defendants*.

Complaint

Action for declaratory judgment, mandamus and other relief.

1. The action arises under the Civil Service Act, as amended, 22 Stat. 403, 5 U. S. C. 632, as amended, the Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. 851, and the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S., Appendix 301, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. Plaintiff is a citizen of the State of South Carolina. Defendant, James V. Forrestal, is the duly appointed Secretary of the Navy and executive head of the Navy Department. Frances Perkins, Lucille Foster McMillin, and Arthur S. Flemming, defendants, are the duly appointed members of the Civil Service Commission, an independent agency in the executive branch of the Federal Government.

3. The action is brought under the Federal Declaratory Judgment Act, 28 U. S. C. 400, as amended, to obtain a judgment in an actual controversy declaring the rights and legal relationships of the parties and for further relief.

4. Plaintiff entered the Federal Government Service on May 31, 1933, as a helper [illegible]ermaker, in the Navy Yard at Charleston, South Carolina. Plaintiff was discharged without prejudice on August 15, 1933. Plaintiff was reappointed with a probationary appointment April 5, 1934, as a. shipfitter minimum, and worked continuously in said shop for more than twelve years, as an employee with permanent status in the classified Civil Service, during which period he received promotions through various skilled classifications of labor to the classification of Leadingman Shipfitter at a base wage of $12.08 per day. Plaintiff was demoted to Shipfitter Maximum at a base wage of $10.08 per day on January 7, 1946, in a reduction in force under procedure hereinafter set forth.

5. By virtue of his permanent status in the Federal Civil Service, plaintiff acquired valuable legal rights under the Civil Service Act, as amended 22 Stat. 503, 5 U. S. C. 632, as amended, including the right to remain at work in his position unless removed in accordance with law.

6. On September 25, 1945, the Civil Service Commission promulgated regulations governing reductions in force among Federal personnel [5 C. F. R. (1945 Supp.) Sections 12.301 to 12.314 inclusive], hereinafter called the regulations, purporting to conform to the statutory requirements of Section 12, Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. 861.

7. Thereafter, pursuant to the regulations, defendant, Secretary of the Navy, by his duly authorized officers and agents, established retention registers fixing the order of retention preference of employees in the Navy Yard at Charleston, South Carolina, in the event of a reduction in force, and placed plaintiff, a non-veteran, in the A-2 retention sub-group on the retention register for the Shipfitters Shop in the said Navy Yard, while competing employees, with substantially less service than plaintiff but with veteran's preference, were placed in the higher A-1 Plus and A-1 retention sub-groups on the said retention register.

8. On November 8, 1946, after due notice under the regulations, plaintiff, with twelve years' service and an excellent efficiency rating was placed in furlough status for a period up to one year by defendant, Secretary of the Navy, in a reduction in force at the Navy Yard effected pursuant to the regulations, although competing employees in the A-1 Plus and A-1 sub-groups, some with less than three years' service, were retained in active service.

9. On information and belief more than 500,000 employees will be separated from their positions in the Federal civil service between now and July 1, 1947, under the Federal Government's publicly announced program for such reductions in Federal personnel and plaintiff's absolute separation from the service will be effected during this period under the regulations, which remain in full force and effect.

10. The establishment under the regulations of the A-1 Plus retention sub-group giving World War II veterans an absolute retention preference during a one year period after return to duty over all competing employees in the A group, with no regard whatsoever to relative length of service is unreasonable, arbitrary and capricious, without statutory warrant and contrary to the express provisions of Section 8(c) Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. Appendix 308 and Sec. 12 Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. 861.

11. The establisment of the A-1 retention sub-group, giving veterans a higher retention preference over competing non-veterans in the A group, with no regard whatsoever to relative length of service is unreasonable, arbitrary and capricious, without statutory warrant, and contrary to the express provisions of Sec. 12 Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. 861.

12. The application of the unlawful regulations by defendant, Secretary of the Navy, to plaintiff, as hereinbefore alleged, has operated to deprive plaintiff of his office as Leadingman Shipfitter in the Shipfitters Shop in said Navy Yard contrary to law.

13. Plaintiff has at all times since his demotion and furlough been ready, able and willing to perform the duties of his office as Leadingman Shipfitter in the Shipfitters Shop but has been and is being unlawfully deprived of his office as hereinbefore alleged.

14. Plaintiff has suffered and will continue to suffer, unless relief is afforded by this Court, irreparable damage in that he has been, is being, and will be unlawfully and unjustly deprived of his office and the rights, privileges, and emoluments pertaining to it.

15. Plaintiff is without adequate remedy at law.

WHEREFORE, plaintiff demands that the Court adjudge and order:

4 1. That the reduction in force regulations of the Civil Service Commission, insofar as they establish, without regard to relative length of service, the higher A-1 Plus and A-1 retention preference in favor of veterans in competition with non-veterans, are void and of no effect as contrary to law and unlawful in their application to plaintiff.

2. That a writ issue in the nature of a writ of mandamus to defendant, Secretary of the Navy, commanding him to restore plaintiff forthwith to his office as Leadingman Shipfitter in the Shipfitters Shop at the Navy Yard, Charleston, South Carolina, together with all the rights, privileges, and emoluments of said office.

3. That a writ issue in the nature of a writ of mandamus to defendants, Frances Perkins, Lucille Foster McMillin, and Arthur S. Flemming, members of the Civil Service Commission, requiring them to rescind the regulations and reconsider and promulgate new regulations in conformity with the requirements of Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. 851, as declared by the court.

4. That plaintiff have such other and further relief as is just.

MORTIMER KOLLENDER,
1129 Vermont Avenue, N. W.,
Washington, D. C.,
WALTER B. WILBUR,
308 Peoples Building,
Charleston 3, South Carolina,
J. HOWARD YATES,
308 Peoples Building,
Charleston, S. C.,
Attorneys for Plaintiff.

5 Filed Jan 17 1947

Answer

For answer to the complaint herein the defendants state:

1. Defendants admit the allegations contained in Paragraph 1 of the complaint.

2. Defendants admit the allegations contained in Paragraph 2 of the complaint.

3. Defendants admit the allegations contained in Paragraph 3 of the complaint.

4. Defendants admit all the allegations contained in Paragraph 4 of the complaint except the allegation that plaintiff's demotion as of January 7, 1946 to Shipfitter Maximum at a base wage of $10.08 per day was due to a reduction in force, and aver that on January 7, 1946 plaintiff was reassigned as a Shipfitter at a base wage of $10.08 per day due to an adjustment of the supervisory force.

5. Defendants admit the allegations contained in Paragraph 5 of the complaint.

6. Defendants admit the allegations contained in Paragraph 6 of the complaint and defendants aver that such regulations governing reductions in force did in fact conform to the statutory requirements of Section 12 of the Veterans' Preference Act of 1944.

6

7. Defendants admit the allegations contained in Paragraph 7 of the complaint.

8. Defendants admit the allegations contained in Paragraph 8 of the complaint.

9. With regard to the allegations contained in Paragraph 9 of the complaint defendants admit that there will be some reduction in Federal Civil Service personnel and substantially greater reduction in Federal War Service personnel during the period to July 1, 1947. The allegation that due to such reductions, plaintiff will be absolutely separated from the Federal Civil Service by July 1, 1947 is a conclusion and requires no denial; however, insofar as a denial may be required, said allegation is denied.

10. Defendants deny the allegations contained in Paragraph 10 of the complaint.

11. Defendants deny the allegations contained in Paragraph 11 of the complaint.

12. The allegations contained in Paragraph 12 of the complaint are legal conclusions and require no answer; however, insofar as an answer may be required, the allegations are denied.

13. The allegations contained in Paragraph 13 of the complaint are legal conclusions and require no answer; however, insofar as an answer may be required, the allegations are denied.

14 The allegations contained in Paragraph 14 of the complaint are legal conclusions and require no answer; however, insofar as an answer may be required, the allegations are denied.

7 15. Defendants admit the allegation contained in Paragraph 15 of the complaint.

FOR A FIRST AFFIRMATIVE DEFENSE

16. The placement of plaintiff in a furlough status, due to curtailment of work and the attendant necessity for reduction in force, was effected in complete conformity with all applicable and controlling statutes, rules and regulations and not in violation of any provision of the Civil Service

Act, Veterans' Preference Act of 1944, or the Selective Training and Service Act.

FOR A SECOND AFFIRMATIVE DEFENSE

17. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the defendants pray that the complaint be dismissed with costs.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.

8 Filed Jan 28 1947

Order Dropping Lucille Foster McMillin, as United States Civil Service Commissioner, as a Party Defendant and Adding Harry B. Mitchell, as United States Civil Service Commissioner, as Party Defendant in Her Place and Stead and Amending the Pleadings Accordingly

Upon motion of plaintiff and the written consent of defendants by their attorneys and it appearing to the court that defendant Lucille Foster McMillin having ceased to serve as a United States Civil Service Commissioner prior to the filing of the complaint herein is not a necessary party defendant and that Harry B. Mitchell is and has been at all times material herein a duly appointed United States Civil Service Commissioner and proper party defendant within the jurisdiction of this court,

IT IS ORDERED THAT:

(1) Lucille Foster McMillin be dropped as a party defendant.

(2) Harry B. Mitchell, as United States Civil Service Commissioner, be and he is hereby added as a party defendant.

IT IS FURTHER ORDERED THAT:

The pleadings be and they hereby are deemed amended by substituting the said Harry B. Mitchell for the said Lucille Foster McMillin in the caption and wherever the latter is named in the pleadings.

T. ALAN GOLDSBOROUGH,
Justice.

JOHN F. SONNETT,
Asst. Attorney General.

GEORGE MORRIS FAY,
United States Attorney.
Attorneys for Defendants.
By D.P.M.

9 Filed Mar 1 1947

Plaintiff's Motion for Summary Judgment

Now comes plaintiff, Earle W. Hilton, by his attorneys, and on the annexed affidavit, and the record herein including the complaint and answer, moves the Court for summary judgment pursuant to Rule 56a of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

MORTIMER KOLLENDER,
WALTER B. WILBUR,
J. HOWARD YATES (by L. R. W.)
Attorneys for Plaintiff.

10 Filed Mar 1 1947

Affidavit

STATE OF SOUTH CAROLINA,
County of Charleston, ss:

Earle W. Hilton being duly sworn deposes and says:

I am the plaintiff in the above described cause and for more than twelve years until November 8, 1946, I had served on active duty as a skilled craftsman with permanent Civil Service status in the Shipfitters Shop at the Charleston Naval Shipyard, Charleston, South Carolina. I was first employed at the Shipyard on May 31, 1933, as a Helper Boilermaker and was discharged without prejudice from that position on August 15, 1933. Thereafter, on April 5, 1934, I was given a probationary appointment in the classification of Shipfitter Minimum, which was made absolute after six months' satisfactory service. I worked for three years in the classification of Shipfitter Minimum until I was promoted to the classification of Shipfitter Intermediate. After another three years, I was promoted on April 29, 1940, to the classification of Shipfitter Maximum, the highest rating in the non-supervisory mechanic bracket. During 1941 I completed the required periods of training for instructor mechanic and for supervisor, and on January 5, 1942, I was promoted to Leadingman Shipfitter, a position on the supervisory staff, in which I served throughout the critical years of the war. During the war I was classified 4 E by my local Draft Board on November 14, 1944. I was not called by the draft as I was over age.

On January 7, 1946, I received a notice of demotion, from Leadingman Shipfitter at a wage of $12.08 per day to the classification of Shipfitter Maximum at a wage of $10.08 per day due to a reduction of the supervisory force.

11 My selection for this demotion was made pursuant to reduction in force regulations approved by the Civil Service Commission which gave no effect to my length of service in the competition with veterans for retention, as explained in the Commandant's Order No. 109-45 dated

October 23, 1945. On November 8, 1946, I was furloughed without pay for up to one year from my position as Shipfitter Maximum in a second reduction in force pursuant to the Civil Service Commission regulations complained of herein, which again gave no effect to length of service in the competition with veterans for retention.

In these reductions in force employees with substantially less service and skill than I have, but with veterans' preference, were retained. The number employed at the Charleston Navy Yard rose from approximately 7,000 in 1938 to approximately 27,500 at the peak of employment. Most of the new employees were without the knowledge or experience to perform the difficult and skilled task of building, repairing, and maintaining the Navy war ships in the Charleston Navy Yard during the war period. The essential responsibility for performance of the work rested on the experienced career Civil Service employees. Approximately 85% of the employees now accorded veterans' preference were without experience in ship building and were trained by the experienced career Civil Service Employees. Yet, the preference employees, who are little more than ready to graduate from the apprentice class on the basis of peace-time standards and requirements, have replaced the experienced career Civil Service employees who trained them.

I am 41 years old, married, and the father of one child. I have no independent income other than that received for my work. Since 1934 I have made the federal service my career and on the basis of my experience had reason to anticipate, with satisfactory service and conduct, twenty two years of active employment and enjoyment of the rights incident to my status. I have built a home at the Naval Base on the expectation of remaining at the Shipyard.

As a skilled employee with classified status, I enjoyed many rights and benefits which made my job more attractive to me than private employment. As a family man, my first and foremost benefit was the high degree of job security afforded. As a classified employee, I could only be discharged under the law for "cause" in accordance with

statutory procedure, and even if a decrease in the
12 work at the Yard made a reduction in employees necessary, I could count on a fair chance to keep my job in competition with other employees, including veterans, since my length of service and experience were taken into consideration under the reduction in force procedure followed for the classified field service at the Navy Yard.

In addition to my job security, I enjoyed more liberal standards as to maximum hours of work, earned vacations with pay, retirement and sick leave benefits, based in part on my length of service, than are usually found in private employment. Besides all of these personal advantages, I was employing my highest skills in important public work, which was crucial during the war.

Since November 8, 1946, on which date I was transferred from active duty to furlough status without pay, I have had only odd jobs and have earned a total of about $150.00.

As a direct result of the Commission's reduction in force regulations, which disregarded my length of service to the Government in the competition for retention with preference employees, I have already been deprived, to my irreparable damage, of my livelihood, my job security, all the benefits described herein relating to the job, and my skill acquired over the years in my craft is being daily further impaired through disuse. Under the current policy of Federal personnel reduction, it is a virtual certainty that I will be finally separated from the Federal service with no hope of reinstatement at the expiration of my one-year furlough period on November 8, 1947, unless the court declares invalid the regulations complained of herein.

EARLE W. HILTON.

Sworn and subscribed to before me, this 19th day of February 1947.

EDGAR LLOYD WILLCOX,
Notary Public for South Carolina.

My commission expires at the pleasure of the Governor.

• • • • • • • • • •

13 Filed Mar 14 1947

Stipulation I.

It is hereby stipulated between the parties by their respective counsel that the following annexed documents, marked Exhibits A through H inclusive, are genuine copies of the originals and may be made a part of the record herein together with this stipulation.

1. Notice dated December 21, 1945, to Earle W. Hilton from Commander, U. S. Naval Shipyard, Charleston, South Carolina, on subject 'Demotion of Group IVa Employees. (Non-veteran), marked Exhibit A.

2. Commandant's Order No. 109-45 dated October 23, 1945, on subject 'Adjustment of Supervisory Force, Group IV-A Demotions.' (Superseding reference (a); paragraph 16), marked Exhibit B.

3. Retention Register of Quarterman Shipfitter and Leadingman Shipfitter Classifications at the Charleston Naval Shipyard as of January 7, 1946, marked Exhibit C.

4. Notice of Furlough Because Reduction in Force dated October 7, 1946, to Earle W. Hilton, Shipfitter, from Commander, Charleston Naval Shipyard, marked Exhibit D.

5. Retention Register of Shipfitter Classification at the Charleston Naval Shipyard as of November 8, 1946, marked Exhibit E.

6. Circular letter dated June 27, 1946, from John L. Sullivan, Acting Secretary of the Navy to All Naval and Marine Corps Activities Concerned on subject 'Discussion of Some of the Current and Future Management Problems of the Naval Shore Establishment' together with enclosure, marked Exhibit F.

7. Press Release United States Civil Service Commission No. 60-27/47 dated January 17, 1947, marked Exhibit G.

14 8. Graphic Chart of 'Civilian Employment, Executive Branch of the Federal Government for Year Ended November 30, 1946,' prepared by United States Civil Service Commission, marked Exhibit H.

MORTIMER KOLLENDER,
WALTER B. WILBUR,
Attorneys for Plaintiff.
JOHN F. SONNETT,
JOSEPH M. FRIEDMAN,
Attorneys for Defendants.

15 Filed Mar 14 1947

Exhibit A.

IRD-E-No. 209np

UNITED STATES NAVAL SHIPYARD, CHARLESTON
(P. O.) NAVY YARD, S. C.

Date of Notice 21 December 1945

From: Commander, U. S. Naval Shipyard, Charleston

To: Earl W. Hilton

Subj: Demotion of Group IVa Employees. (Non-Veteran)
Ref: (a) Comdt's Order No. 109-45. dtd. 23 October 1945.

1. The Commander regrets that the reduction in the work Naval Shipyard, requiring an adjustment of both the supervisory and non-supervisory force, makes it necessary to notify you herewith of your rerating from Quarterman Shipfitter to Leadingman Shipfitter effective 7 January 1946.

2. Your services have been satisfactory, and your selection for demotion has been made in accordance with procedures (as summarized in reference (a)) established by the Navy Department and approved by the United States Civil Service Commission. Factors taken into account are the length of time spent in your present or higher supervisory ratings, the nature of your appointment, whether or

not you are entitled to veterans preference, and your efficiency rating, resulting in total retention credit calculated as follows:

Retention Group	*Efficiency Rating*	*Efficiency Credit*	*Allowable Service Credit*	*Total Retention Credit*
A-2	86	—	3.83	3.83

3. Our records do not indicate that you are entitled to veterans' preference. If you believe that you should be entitled to veterans' preference, or if you wish to examine the regulations or to inspect the retention register and records, please consult the Employment Section, Industrial Relations Division, Room 201, Building No. 76 at once. In the event that you should need any advice or information on this subject relative to your rights as an employee of this U. S. Naval Shipyard, you are urged to consult your supervisor or any of my representatives.

4. If you believe that rights under Civil Service regulations have not been recognized in your case, you have the right to appeal this action to Representative, U. S. Civil Service Commission, Room 203, Industrial Relations Building, within ten days after receipt of this notice.

R. N. S. BAKER,
J. S. PATTERSON,
Commander, USNR
Industrial Relations Officer.

CC:
1—Employee
1—Master *Shipfitter*
1—Employee's Adm. Folder
1—T-2

16 Filed Mar 14 1947

Exhibit B.

OFFICE OF THE COMMANDANT
UNITED STATES NAVY YARD
CHARLESTON, S. C.

23 October 1945

ON2/A7-1/LC/LL/P17-2/LL/P-16-1
(C) (R) (P) (N) (T-4-01)

Commandant's Order No. 109-45

SUBJ: Adjustment of Supervisory Force, Group IV-A Demotions. (SUPERSEDING reference (a), paragraph 16)

Refs: (a) Comdt's. Order 81-45 of 1 September 1945.
(b) NCPI 170 Amendment No. 2 of 10 October 1945.

1. Effective immediately, paragraph 16 of reference (a) is superseded and demotions of supervisory mechanical employees (except masters, foremen and other positions whose appointments are made by the Navy Department) and of planners and estimators and progressmen shall be made as follows:

(a) Competitive areas and competitive levels shall correspond to the competitive areas and levels applicable to the trades or occupations in which they are employed, with the exception of progressmen who will be considered as one competitive group.

(b) Retention Register Lists shall be set up by trades showing retention group, sub-groups and retention credits.

(1) Retention credits within sub-groups shall be computed on the basis of length of *allowable service* plus five points for an

excellent efficiency rating (90 or better) based on the latest approved efficiency rating marks at the time the action is initiated. No points will be added to allowable service points for any efficiency mark less than excellent (90).

(2) In the event that two or more employees have the same number of retention credits, ties shall be broken by consideration of factors in the following order:

(a) Entrance on duty date at this yard for the period of current continuous service.

(b) Total Federal Government service.

(c) Official conduct.

(d) Shop Efficiency Rating.

(e) Attendance.

(f) Dependency.

17 (c) Length of service (allowable service) for chief quarterman, special leadingman, leadingman, snapper, and shop personnel supervisors, shall be restricted to the time served in the rating held at the time of demotion *plus* that time that may have been served in higher supervisory ratings in this activity or to continuous allowable service in the ratings concerned where the employee has been transferred from one naval activity to another. Such service shall be computed to the nearest day.

Length of service (allowable service) for planners and estimators, as well as progressmen shall be limited to time served in those ratings in this activity or to continuous allowable service in the ratings concerned where the employee has been transferred from one naval activity to another. Such service shall be computed to the nearest day.

(d) Employees covered by this order shall be demoted in reverse order of retention credits starting with the lowest sub-groups within an affected competitive level. Upon demotion such employees shall (a) fill any established vacancy in the next lower rating or (b) displace an employee in the next lower rating in the same or in a lower retention group and sub-groups than that of the employee to be demoted. The employee displaced shall be the one with the lowest retention credits in the lowest retention group and sub-group involved.

(e) If necessary, employees covered by this order shall be similarly considered for demotion to successively lower ratings. If the employee concerned cannot be demoted without displacing an employee in a higher retention group and sub-group, reduction in force shall be made by trades at the employee's present level. In such case, retention credits shall be computed on the basis of one point for each full year of Federal Service *plus* 5 points for an "Excellent" efficiency rating (90 or above).

(f) Leadingmen should normally be reduced to journeyman ratings except when actual snapper positions exist.

(g) In no case may an employee in retention group B be demoted to a lower rating in which a retention group A employee has been separated or demoted due to reduction in force.

18 (h) *In unusual situations* an employee performing necessary duties which cannot be taken over by any other available employee with higher retention credits, without undue interruption in the work involved, may be retained, al-

though employees with higher preference may be affected. A written statement of the reasons for such exceptions shall be available upon request for inspection by employees adversely affected and for review by the Civil Service Commission.

(i) Employees being demoted shall be extended the option of taking such accumulated annual leave as he desires at the higher rate of pay.

(j) Demotions of masters, foremen, and other supervisory positions whose appointments are made by the Navy Department shall only be made as the result of the Navy Department's action. It is the Department's intention in considering such demotions to apply the policy principles contained herein.

2. Nothing in this order shall be construed to change the procedures in effect for demotion of supervisors for reasons of discipline or inadequate performance.

/s/ JULES JAMES

/s/ F. H. KENAN
Lieut., USNR
Aide to the Commandant,
Distribution "B"
FXD
Members of Shop Committee

Filed Mar 14 1947

Exhibit C.

Quarterman Shipfitter	*Efficiency Credit*	*Total Service Credit*
A-1		
Manuel H. Brown	91	8.53
Thomas R. Doran	94	8.13
A-2		
Thomas Sinclair	93	9.80
David McD. Williamson	91	9.40
Charles F. Garmon	93	9.34
Ernest H. Kornahrens	92	8.88
John Y. Crow	93	8.42
Carl L. Ott	90	8.21
William S. Logan	90	7.75
Walter Fisher	87	4.71
Rock E. Archambault	84	4.43
August H. Almers, Jr.	85	3.96
Angele F. Buere	87	3.08
Haskell H. O'Brien	89	2.67
William E. Brandt	89	2.52
Eugene V. Black	88	2.52
Doctor R. Winter	82	2.46
Thomas R. Brown No. 1	86	2.46
Carleton T. Durant	86	2.25
John F. Reynolds	80	2.19
Leadingman Shipfitter		
A-1		
William D. Monger, Jr.	91	8.83
James E. Dukes	90	8.73
Robert J. Thompson	90	7.96
Coleman B. Rowland	93	7.96
Joseph D. Lanier	91	7.70
Julius W. Roumillat, Jr.	91	7.58
Roy O. Caffey	90	7.25
James L. Gamble	89	3.83
Albert C. Sanburg	88	2.55
Clark A. Putnam	86	2.25
Jimmie D. Box	85	1.79
Edward G. Zwingmann	82	1.52
Roy C. McNeil	84	1.12
Samuel I. Riley	80	.58

Leadingman Shipfitter
A-2

	Biship McK. Bell	94	10.03
	Carlton A. Melvin	91	9.94
	Donald H. Miller	95	9.28
	William B. Rhode	94	9.09
	Edward G. Cooke	91	8.53
	William H. Mitchum	92	8.26
20	Walter A. Stafford, Jr.	93	8.19
	Robert C. Noland, Jr.	93	8.13
	Sidney N. Sellers	94	8.13
	Selvin G. Watson	93	8.08
	Glenn Hearn	93	7.96
	Walter A. Edwards	91	7.70
	Theodore Piaszczyk	83	4.88
	George L. Kornahrens	88	4.00
	Earl W. Hilton	86	3.83
	Clarence B. Skeeter	88	3.53
	Eugene C. Smith	86	3.34
	Reynolds McK. Reeves	85	3.19
	Magnus E. Shier	85	3.08
	Willie W. Holdomb	89	2.96
	Paul O. Priddy	86	2.58
	Eli B. McDaniel	86	2.58
	James L. Jones, No. 1	83	2.56
	Nealy B. Baldwin	84	2.58
	Lloyd S. Johnson	85	2.54
	Harold S. McGuiness	87	2.50
	Cecil O. Driggers	89	2.50
	Paul C. Taylor	87	2.46
	Henry L. Steinmeyer	84	2.25
	Leroy Walker, No. 1	82	1.48
	Daniel L. Carter, No. 1	83	1.48
	Harry C. Metts, No. 1	85	1.48

21 Filed Mar 14 1947

Exhibit D.

LL/P18-1/P16-1/P19(1722)

CHARLESTON NAVAL SHIPYARD
NAVAL BASE, S. C.

Date of Notice *7 October 1946*

From: Commander, Charleston Naval Shipyard
To: Earl W. Hilton, Shipfitter, Ck. No. 11-257.
Subj. Notice of Furlough Because of Reduction in Force.
Refs: (a) NCPI 170 (Rev. I), dtd 1 May 1946.

(b) Navy Dept. Cir. Ltr., OIR:100:crc, CPL&D-46-202 dtd 12 Sep 1946.

(c) Notice of Separation Because of Reduction in Force dtd *10 September 1946*

Encls:

(A) IRD-E-No. 140a

(B) Pamphlet "Information to Employee"

1. The Commander regrets that, due to curtailment of work and/or funds, it will be necessary to eliminate certain positions in your competitive level. Your name has been reached for action. In view of the expressed policy of the Navy Department to retain its long-time, high-grade career employees and in the hope that within one year conditions may justify your recall to duty, it is proposed to place you in a furlough status rather than effect your absolute separation by reduction in force. You are hereby given a 30-day notice that you will be placed on furlough on *8 November 1946* or at the expiration of any annual leave which you may have to your credit, whichever is later. Your active service was terminated on *19 September 1946* in accordance with reference (c). You will be placed on leave with pay if you have annual leave to your credit, otherwise leave without pay, until the effective date of your furlough.

2. In the event you desire to be separated rather than furloughed, you should so advise the Industrial Relations

Officer in writing, using enclosure (A). Upon receipt of your written request, you will be involuntarily separated from the service by reduction in force, instead of being furloughed. In the event enclosure (A), requesting separation by reduction in force, is not received by Industrial Relations Officer on or before *7 November 1946*, it will be assumed that furlough is acceptable to you. *Attention is invited to the fact that if you are placed on furlough, you will be unable to secure a refund of your retirement deductions until such time as your furlough is terminated by an absolute separation.*

3. The reduction in force regulations require that you be given an opportunity for transfer or reassignment within the Navy Department to a position of like seniority, status and pay in the same geographical location under certain conditions. For information concerning a possible transfer or reassignment, you should consult the Placement Unit, Room 201, Industrial Relations Division, Building No. 76 within 10 days of the date of this notice. If it is impossible to place you in a position of like seniority, status and pay, an attempt will be made to place you on a position in a naval activity in this geographical area involving a reasonable change to lower grade, providing such is satisfactory to you.

4. If you are in sub-group A-1 plus with an efficiency of "Good" or better, you will be carried in a furlough status for a period of 1 year from the effective date of furlough unless sooner recalled to duty. At the end of the one year period, you will be separated for reduction in force. If you are in retention sub-group A-1 plus, with an efficiency rating of less than "Good", your furlough will be terminated by separation due to reduction in force on....., the expiration of your statutory retention period, unless sooner recalled to duty.

22 5. If you are in sub-group A-1 or A-2 you will be carried in a furlough status for a period of one year from the effective date of your furlough, unless sooner

recalled to duty. At the end of the one year period you will be separated for reduction in force.

6. The services you have rendered during the wartime emergency are greatly appreciated. Your selection for furlough has been made in accordance with procedures established by the Navy Department and approved by the U. S. Civil Service Commission. Factors taken into account are the nature of your appointment, whether or not you are entitled to veterans' preference, your efficiency rating, and the length of your Federal service, resulting in total retention credit calculated as follows:

Retention Group	*Efficiency Rating*	*Efficiency Credit*	*Allowable Service Credit*	*Total Retention Credit*
A-2	E	5	12.46	17.46

7. If you wish to examine the regulations or to inspect the retention register and records, please consult the Employment Section, Industrial Regulations Division, Room 201, Building No. 76. In the event that you should need any advice or information relative to your rights as an employee of this Shipyard, you are urged to consult your supervisor or any of my representatives.

8. Records indicate that you are (not) entitled to veterans' preference. If you believe that you should be entitled to veterans' preference, please consult the employment Section, Industrial Relations Division, Building No. 76 at once. If you believe that your rights under Civil Service regulations or the Veterans' Preference Act of 1944 have not been recognized in your case, you have the right to appeal this action of the U. S. Civil Service Commission. The Office of the Area Supervisor, Fifth Civil Service Region is located in Room 204, Building No. 76, Naval Base, S. C. This appeal must be made in writing within 10 days of receipt of this notice and should include your specific reasons for appealing.

9. According to our records, you (do not) have reemployment rights in the ..... If you

(Name of Federal Agency)

have these rights, you should apply to that agency immediately, and not later than 40 days after the effective date of your furlough.

10. If you are interested in further Federal employment, the following information is pertinent: On 4 February 1946 by Executive Order No. 9691, the Civil Service Commission was directed to resume the practice of holding examinations leading to permanent appointment in the Federal service. Announcements of examinations leading to permanent appointment will be posted in first and second class post offices and press releases will be distributed to newspapers. You should watch these sources of information for the date on which any examination in which you are interested is announced. Pending establishment of registers from these examinations, Federal agencies have been authorized by the Civil Service Commission to effect reappointments, transfers, promotions and appointments to all classified positions in the Federal service on a temporary basis, where such agencies are authorized to increase personnel. Should you secure reemployment in another Federal agency, application should be made immediately for transfer from this shipyard. (Furlough status)

C. S. SEABRING
By Direction

CC: 1722
173
1721 (File)
Master *Shipfitter*

23 Filed Mar 14 1947

Exhibit E.

Shipfitter A-1 X	*Efficiency Credit*	*Total Service Credit*
Eugene C. Brockenfelt	E	10.23
Thomas E. Clark	E	10.14
Wilson A. Ham	G	7.38
Clinton G. Beach	G	7.09
Daniel L. Jenkins, Jr.	G	7.41

Frank E. Craven	G	6.89
Maurice W. Sullivan	G	6.69
Fred A. Stender	G	6.46
Julian E. Ritter	G	6.05
George F. Gonzales	G	6.05
Charles F. Heape	G	6.26
James W. Ewers	G	6.03
Norman B. Keenan, Jr.	G	6.02
Wilton L. Adams, Jr.	G	6.01
William J. Sheppard	G	5.98
Herbert L. Thorpe	G	5.84
Francis E. Middleton	G	5.71
John H. Martschink, Jr.	G	5.55
Philip Meyer	G	5.53
Farmer G. Cone	G	5.57
James G. Hitopoulos	G	5.49
Roy E. Wagner	G	5.06
Lee R. Watkins	G	5.06
Vernon E. Johnson	G	5.06
Thomas D. Kellahan	G	5.05
William J. Britz	G	5.03
Lyndon N. Mountain	G	5.02
Joseph C. Wall	G	4.98
Austin W. Graham	G	4.90
Luke E. Chewning	G	4.85
James A. Rourk No. 2	R	4.83
Elton C. Hartley, Jr.	G	4.73
Robert E. Werts	G	4.71
Jesse Graham	G	4.71
Leonard L. Farr	G	4.71
Ralph S. Fail	G	4.71
John E. Legette	G	4.70
Oscar C. Melton	G	4.69
Rogers L. Judy	G	4.65
Murphy S. Wessinger	G	4.58
Nowell N. Self	G	4.56
James L. Owen	G	4.59
Lewis A. Cope	G	4.66
Hubert P. Bobo	G	4.48
Raymond N. Riley	G	4.46
Albert N. Watts	G	4.46
Albert E. Rogers	G	4.38
Johnnie Nolin	G	4.37
Samuel G. Tippins	G	4.36

	Herman L. Leonard	G	4.32
	Francis P. Johns	G	4.32
	Marion F. Walton	G	4.31
24	Jennings B. Johnson	G	4.31
	Hampton O. Paul	G	4.30
	John B. Cannon	G	4.29
	Willie T. McCarty	G	4.34
	Paul E. Whipple	G	3.28

A-1 X No Efficiency

Edward L. Knight, Jr.	6
Eugene G. Villeponteaux	7
Wilbun E. Mitchel 3	6
Inman B. Woods	6
David E. Hartzog	6
Cecil B. Williams	5
Willie Caison	6
Henry T. Muller	5
Raymond A. Naylor	5
William J. Voight	8
David L. Hutto	5
Mack R. Hucks	5
Frank C. Roberts, Jr.	5
Raymond H. Hahn	6
Christopher L. Wynham	6
Watson W. Clark	6
Henry Almers	7
James W. Richardson	5
Clinton D. Altman	5
Marion H. Salerni	8
Roy S. Clifton	6
Samuel E. Vereen	5
Solomon E. Collins	5
Daniel H. Pigott, Jr.	6
James E. Cloaninger	5
Thomas B. Young	4
Herman T. Schurlknight	8
James C. Morrison	5
Charles C. Deantonio	6
William L. Sheffield, Jr.	4
Donald P. Kearns	6
Marvin R. Allen	5
Edward W. Gay	6
Efford M. Ivie	5

Ralph H. Harley		7
William C. Mole		7
Ralph L. Sedgwick		6
Norman E. Bailey		6
Robert R. Patz		5
John B. Gaskins		7
Charles P. Sanders, Jr.		6
Roy Seay		5
Thomas A. Jamison, Jr.		6
Clifford W. Bath		5
William J. Thrift, Jr.		8
William J. Thrift, Jr.		8
25 Charles R. Harrah		5
Clifford M. Songer, Jr.		8
Charles J. Finnegan		6
Edward B. Delk		5
Louis E. Douglas		6
Joseph M. Murr		6
Paul E. Pearce		5
Marion L. Hanagriff		6
Drayton H. McClellan		6
James H. Folk		5
Harry C. Stoudenmire		5
Lawrence A. Hartnett		6
Leonard M. Freeman		6
James L. Gibson		5
Warren H. Seyle		6

A-1

Clinton I. Washburn	G	25.13
George Rusler	G	23.91
Herman D. Couch	E	21.08
Hugo W. Metzé	E	19.45
Charles A. Tribble	E	18.58
Glynn W. Potter	E	17.73
Homer P. Stephens	E	17.33
William L. Clapper	E	17.30
James L. Bennett	E	16.07
Gilbert L. Smith	E	14.23
Jessie J. Sammons	G	14.07
William R. Morris	E	13.74
George W. McCullough	E	13.52
Herbert H. Adams No. 1	E	13.79
Rowland P. Norton	E	13.40

	Jesse F. Vaughn	G	13.31
	Tannie W. Jacques	G	12.51
	Wardie J. Turner	E	12.65
	Albert R. Jacobs	E	12.76
	Walter C. Bailey	E	12.87
	Charles G. Thomas	G	12.04
	James W. Walsh, Jr.	E	12.02
	William G. Whaley	E	12.30
	Alvie L. Box	E	12.39
	Thomas E. Bridges	E	11.88
	Marler Crow	E	11.94
	George D. Gettman	G	11.00
	Wade T. Myers	G	10.14
	Elmo Harris	G	9.85
	Frank T. Cawley	G	9.81
	David W. Stone	G	9.87
	Hiram H. Blackburn	G	9.89
	William D. Mitchell	G	9.84
	James O. Ivey	G	9.66
	William J. Hunt	G	9.00
	Robert E. Kennedy	G	9.30
	Walter L. Haile	G	9.22
26	Louis E. Black	E	9.34
	William L. Dawson	G	8.81
	Gervase G. Gaskins	G	8.72
	Edwin W. Rogers	G	8.09
	John H. Davis No. 1	G	8.00
	Henry I. Crumpton	G	7.62
	Jack H. Morris	G	7.81
	Andes M. Chapman	G	7.79
	Julian E. Beattie	G	7.19
	Clayton H. Swink	G	8.95
	Francis C. Blake	G	6.50
	Luther J. Moulds	G	6.88
	William V. Hickman	G	6.05
	Stanton C. Davenport	G	6.28
	William F. Monogan	G	6.15
	John P. Cantweel	G	5.68
	Albert A. Anderson	G	5.88
	Hal C. Nichols	G	5.91
	Roy C. Burnett	G	4.25
	James D. Smith	G	4.13

A-2

	Clarence B. Skeeter	E	26.72
	Eugene C. Smith	E	25.78
	George L. Kornahrens	E	23.61
	James C. Bunch	E	19.39
	Henry L. Steinmeyer	E	19.07
	Earl W. Hilton	E	17.46
	Hugh L. Black	E	17.07
	Leroy C. Axson	E	17.21
	Cleveland J. Smith	G	17.06
	Ernest L. Rogers	E	16.73
	James L. Fox	E	16.28
	Carl J. Westbury	E	16.24
	Paul C. Taylor	E	16.23
	Joseph R. Favian	G	15.66
	Harold S. McGuiness	E	15.81
	John C. Langley	E	15.82
	Harry C. Metts No. 1	E	15.17
	James G. Cummings	E	15.38
	Reynolds McK. Reeves	E	14.59
	Shelby D. Galloway	E	14.62
	James L. Jones No. 1	E	14.71
	Robert G. Hall	E	14.90
	Alexander Elliott	E	14.19
	John Cooke, Jr.	E	14.47
	Walter M. Evans	E	13.72
	John J. Murphy	E	13.33
	Gilbert S. Ott	E	13.33
	James E. Streets, Jr.	E	13.28
	Wilfred H. Miller	E	13.02
27	James C. Whaley	E	13.01
	James E. Herndon	E	13.01
	Raphael P. Pooser	E	13.00
	Albert P. Ham, Jr.	E	13.39
	Bernard A. Holst	E	12.91
	Truman James	E	12.89
	Ualton T. Warren	E	12.87
	Peter P. McTavish	E	12.76
	William A. Wise, Jr.	E	12.74
	Joseph C. Joye	E	12.54
	John B. Priester, Jr.	E	12.75
	Marion D. Cotton	E	12.71
	Charles J. Relyea	E	12.33
	Joseph G. Grace, Jr.	E	12.32

	Edmond J. Pop	E	12.27
	Clarence E. Forbes	E	12.13
	Clarence Tisdale No. 1	E	12.04
	Lucius A. Gardner, Jr.	E	12.02
	Cecil H. Jaques	E	12.24
	Edward H. Tolley	E	12.04
	Theodore J. Limehouse	E	12.01
	Magnus E. Shier	E	12.37
	Ernest G. Pearson	G	11.93
	Charles J. Cox	G	11.58
	Lewis S. Malone	E	11.76
	John H. Beckroge	E	11.73
	Charles B. Peigler	E	11.72
	James T. Fralix	E	11.69
	Emerson H. Orear	E	11.69
	Wallace D. Casteel	E	11.66
	Leroy Walker No. 1	E	11.64
	Reese A. Inabinett	E	11.60
	William E. Taylor, Jr. No. 1	E	11.57
	Ernest R. Swindler	E	11.52
	Albert J. Garner	E	11.51
	Samuel W. Thompson	E	11.52
	Frank H. Thompson No. 1	G	11.39
	Norman B. Altman	G	11.02
	Daniel A. Thomas	E	11.49
	Patrick J. Melia	E	11.44
	Clarence P. Way	E	11.11
	Berry C. Brooms	E	11.05
	Robert E. Oliver, Jr.	E	11.05
	Marion H. Wilder	E	10.50
	Eli B. McDaniel	E	10.92
	Charles H. Missell, Jr.	E	10.90
	Benjamin C. Farmer	E	10.85
	Ralph E. Caddell	E	10.82
	John B. Williams No. 1	G	6.27
	Charles E. Padgett	G	6.27
	Leonard W. Scott	G	5.87
	Joseph F. Duncan	G	5.74
	Major F. Smith	G	5.82
	Austin E. Moody	G	5.74
28	Daniel C. Morris	G	5.55
	James H. Bridgman No. 1	G	5.69
	Ralph Davis	G	5.24
	Isaac L. Gardner	G	5.16
	John E. Barrineau	G	4.29

A Non Vet. No. Efficiency

Doctor R. Winter
Eugene V. Black
Walter A. Stafford, Jr.
Walter B. Britton

A-2 No Efficiency

Black, Eugene V.
Mitchum, William H.
Edwards, Walter A.
Brown, Thomas R.
Cooke, Edward G.
Crow, John Y.
Durant, Carlton T.
Hearn, Glenn
Hiott, Langdon H.
Miller, Donald H.
O'Brien, Haskell
Piaszczyk, Theodore
Pierce, James B.
Reeves, Reynolds McK.
Rhode, Wilbur J.
Rhode, William B.
Watson, Selvin G.
Cleveland, Glenn E.
Williams, John B.

29 Filed Mar 14 1947

Exhibit F.

SECNAV
OIR:100:s11

CPI&D-46-160
F

NAVY DEPARTMENT
WASHINGTON 25, D. C.

27 Jun 1946

CIRCULAR LETTER

To: All Naval and Marine Corps Activities Concerned
Subj: Discussion of Some of the Current and Future Management Problems

1. Enclosed 1 is a discussion of some of the problems facing the Naval Shore Establishment.

2. It is requested that a copy of enclosure 1 be placed in the hands of each supervisor and officer connected with

civilian employment. It is further requested that the commanding officer of each station, in conference with his principal officers and supervisors, discuss and analyze the problems specifically as they apply to the operation of his station.

/s/ John L. Sullivan
JOHN L. SULLIVAN
Acting Secretary of the Navy

Encl: (HW)
1. Discussion of Some of the Current and Future Management Problems of the Naval Shore Establishment

DISTRIBUTION:
OIR Special List No. 25

30 DISCUSSION OF SOME OF THE CURRENT AND FUTURE MANAGEMENT PROBLEMS OF THE NAVAL SHORE ESTABLISHMENT.

RADICAL DIFFERENCES BETWEEN NAVY'S PRE-WAR AND POST-WAR INDUSTRIAL RELATIONS

Today, management philosophy and employment conditions in the Navy are radically different from what they were prior to the outbreak of the war. A few years ago operation was on the basis of the balanced shop, a man's efficiency rating being relative to the efficiency of other men, and layoffs essentially followed the men's relative efficiency. Veteran preference existed, but since the number of veterans in the employ of the Navy was not large, preference rights accorded veterans were not significant factors in management's problems. Prior to the war there was no specific pay increase policy for ungraded employees wither published or understood. Present conditions require changes in the previous concepts of many phases of industrial relations.

The balanced shop, which included in its concept the idea that each pay rate within a trade was a different position, has been eliminated. There has been substituted in its

place a concept that the trade rating is the position and the pay rates are steps of the position. Although this change was made administratively, it was actually the only logical step that could be taken considering the problems created by the reduction in force regulations issued by the Civil Service Commission under the authority of the Veterans' Preference Act. This change resulted in (1) the establishment of a published pay advancement policy that must over a period of time result in practically all employees attaining the maximum rate of pay of their rating, if retained in service after probation, (2) marking the efficiency rating of all persons in a trade in accordance with a standard applicable to the entire trade and with no distinction in the standard as applied between those receiving the minimum rate of pay and those receiving the maximum rate of pay, and (3) the establishment of the trade as the competitive level for a reduction in force rather than having each pay rate constitute a separate competitive level.

A man's efficiency must now be determined on what he himself does on the tasks or jobs assigned him, and not on how much better or worse some other man could do on the same or other jobs.

Veteran employment is rising rapidly, and as a consequence veteran preference is becoming very significant in all phases of management.

Layoffs will in the course of time be primarily determined on the basis of veteran preference and seniority, ignoring status. Status while very significant now, will soon cease to be a major factor as war service employees are laid off or converted to permanent employees. To a very great extent, efficiency ratings, the foundation of a merit system, have been subordinated to veteran preference rights and seniority.

31 MANAGEMENT MUST BRING ITS THINKING UP-TO-DATE

To change the thinking and firmly established habits of thousands of people is a most difficult task. Unless we examine present conditions carefully, we are apt to think in the past and take actions based on the old concepts of a

balanced shop, relative efficiency, and like items. Management must bring its thinking up to the present. Unless management does accept the current policy and operate under it, irreparable injury will result, not only to individual shore establishments, but the Navy as a whole.

Efficiency Ratings Now Based Solely on Individual Work Performance

A most difficult thing to change in men's minds is their concept of efficiency ratings. The directives of the Navy Department have not and possibly could not have been made sufficiently clear to bring about this change as rapidly as desired. In a further endeavor to clarify, this section and the three following contain a somewhat detailed discussion of the subject of efficiency or performance ratings.

Efficiency ratings *now* are based entirely on a man's individual work performance. His performance is to be measure on the tasks, operations, or work assignments that he actually does during the rating period. His rating is *not* to be dependent upon what he *might* have been assigned to do, or on what he *may* be assigned to do in the future, nor is it to be dependent upon what some other man's efficiency is considered to be on that man's task, operation, or work assignment. It is emphasized that a man's rating is individual to himself and is to be determined only on how well he does the actual tasks to which he has been assigned during the rating period for which he is marked.

Since efficiency ratings are no longer based on the efficiency of the employee concerned relative to the efficiency of his fellow workers, it is conceivable that in unusual instances all employees doing the same job could receive efficiency ratings of "Excellent and Outstanding" or all could receive efficiency ratings of "Good", even though it is admitted that the overall performance of each person is not exactly the same.

The difficulties some persons are now having with efficiency ratings arise primarily from a failure to distinguish between the man's actual work performance and his quali-

fications. Some are attempting to determine a man's efficiency on the basis of his qualifications. A man's initial employment is based on qualifications and is determined by the Civil Service Commission. If he is retained in employment after probation, adequate qualifications must be assumed. A determination is made at the time of employment as to how well he may be expected to perform the tasks or operations of his trade that may be assigned him. That determination is based on apprenticeship or its equivalent, his years of work experience, and the type of work experience that he may have had. After permanent appointment, so far as efficiency ratings are concerned,
32 it is no longer a matter of qualifications. An employee's efficiency rating must not be based upon a guess or estimation as to how well he could do certain types of work, if he were so assigned. As stated above, his efficiency rating depends on how well he himself does the work, operations or tasks that are actually assigned him during the rating period.

The above concept does not destroy the usefulness of qualifications. Action taken on the basis of qualifications is a field separate unto itself. That field is commonly known as "placement". The initial employment of each person is determined on the basis of his qualifications. After employment, good management assigns and reassigns him to tasks in line with his qualifications. Good placement puts a boring mill man on boring mill work, puts a lathe man on lathe work, puts a pump man on pump assemblies, etc. Conversely, good placement does not put a radio electrician on house wiring, or a telephone-board electrician on power wiring. Certain employees may be qualified for many types of work within the trade classification. Following placement, a man earns or merits his efficiency rating entirely on how well he does the task assigned him (which assignment is the prerogative of management during the rating period.

Lay Offs no Longer Based Mainly on Relative Efficiency

As stated before, reductions in personnel occasioned by lack of funds or lack of work are now based primarily on

status, veteran preference and seniority. So far as efficiency ratings are concerned, their principal importance in reduction of force is confined to determining the employees who are "good" and those who are "less than good". The theory upon which this action has been taken by the Congress and the Civil Service Commission is that all employees who receive a "Good" efficiency rating are fully satisfactory employees and that between such fully satisfactory employees, veteran preference and length of service should be the important factors.

EFFICIENCY RATING OF "GOOD" CANNOT BE CHANGED TO "REASONABLY SATISFACTORY" IF PREFERENCE IS THE SAME.

It must be realized that a man's efficiency rating is not a changeable thing, provided that he has constant assignment to one type of work and the work result remains the same. Even if work assignment are changed an efficiency rating is not changeable, provided that equivalent work results are obtained. Therefore, it must be accepted that no man who is given an efficiency rating of "Good" or better can later be given a rating of "Unsatisfactory" or Reasonably Satisfactory" when his assignment is unchanged and the man's work performance is as good or better than it ever was. It certainly must not change due to qualifications, whether those qualifications are real or imagined on his or on some other person's part. It is theoretically possible, however, that an employee may be given a rating of "Good" and later be given a lower rating, even though his assignment and work results are unchanged, in a case where management admits that the former rating was in error.

33

The word "theoretical" is used advisedly since although it is easy to raise an employee's mark, it is extremely difficult, from the standpoint of public opinion, to give him a lower mark.

The Navy is now in a period of demobilization and reduction which is imposing both management and industrial relations problems. To a great extent the prestige of the Navy in the eyes of the public will be affected by the manner in which the Navy meets its reduction in force problem.

It is not an easy task at any time to reduce force and discharge large numbers of employees. Complaints of discrimination and injustice are to be expected. The number and intensity of complaints received during mass demobilizations will decrease as the Navy more closely attains its post war level of employment. But the Navy should proceed now in such a manner as to keep complaints to a minimum during this period of confusion and to reach normal times with the best public and industrial relations that it is possible to attain. It is important to remember that while many hear of the few mistakes, few know of the vast majority of cases that are handled correctly. It is also important to remember that, to the public, the Navy is one employer. Actions taken by one station that are not justifiable under present statutes, regulations or good industrial relations will be charged by the public against the Navy as a whole. This may result in remedial action being taken against the Navy which places on its onerous conditions and restraints.

It is unfortunate that the Navy, in this period of industrial readjustment, was required by circumstances to change its shop efficiency rating system from a numerical system to an adjective system. The change was necessary but it should have been made long ago. Since the change has been made, caution must be exercised to assure that the change does not result in injury to individual men. Care must be taken that employees do not have their efficiency marks lowered from "Good" to "Reasonably Satisfactory" solely because of the change of system. This could conceivably occur in some cases. Employees who barely qualified for a mark of "Good" under the old system may, under a strict compliance with the new system, qualify only as "Reasonably Satisfactory" although there has been no change in their work assignment or in their work performance. The Navy Department does not desire such a result to an individual. If the system is unjust to a specfiic individual, management must make individual administrative corrections. An employee whose work performance

has not changed should not be dropped from "Good" to "Reasonably Satisfactory". However, if a man's performance has actually decreased to a point below the standards set for a "Good" efficiency rating, it is proper and necessary that his efficiency mark reflect that fact. But, a word of warning: it is extremely important, especially in this period of reduction in force, that management be clearly able to demonstrate the fact that the work performance has lowered to that extent. Efficiency ratings must not be lowered on generalities or on opinions which cannot be substantiated. Above all, the efficiency rating must be used as a tool to evade requirements of the statutes or regulations.

34 Repeated Rating of "Reasonably Satisfactory" Means Poor Management

It can be argued that no man should be rated "Reasonably Satisfactory" over long periods of time, since this really means that although his performance is not completely "unsatisfactory", it is not "fully satisfactory". This argument may be considered a bit revolutionary. In proving this point, it can be said that a newly employed man who cannot attain a mark of "Good" or better, which is defined as "fully satisfactory", should not be retained in employment beyond his probationary period. This is true, of course, only provided that he has been given fair opportunity to adjust himself and become fully satisfactory under the standards that have been established. Management has a right to establish such standards. In the case of men past their probationary period who have once been classified as "fully satisfactory" and who now fall below that level or work performance, a special problem is presented and special means to reach a solution is required. The reason for reduction in efficiency must be determined. If management is at fault, it must correct the fault. If the man is at fault, assistance must be given him to correct his fault. This may mean training, counselling, change of work assignment, or other methods. If advice and assistance is

extended to the individual and he fails to bring his performance up to the standard, then eventually one of two actions must be taken. His efficiency rating must go even lower to "Unsatisfactory" or, as an alternative, charges based on his specific weakness must be preferred and such charges must lead to eventual separation. The fact must be accepted that every man has a right to a fair opportunity to attain and retain a "Good" rating. It follows that it is management's duty to see that he either meets the established standards or is eliminated.

Efficiency Rating Changes by Reviewing Officials

It has been contended that is is improper for management to change an efficiency rating which has been given by the supervisor who acted as rater. The argument is advanced that since the rater has the responsibility for rating, it is necessary to abide by his decision and that to act otherwise will destroy the morale of the supervisor. This reasoning is not correct. Every day administrative or executive officers have actions for which they are responsible reviewed and in many cases changed or modified by their superiors. Modifications in the actions of subordinates in the matter of efficiency ratings are no different in principle from the modifications often made in design work, planning and estimating, and like cases. Such reversals are not even restricted in practice to intermediate supervisors, nor are they restricted to the commanding officer of a station, the chief of a bureau, or even to the Secretary of the Navy. The capacity of an individual to accept a reversal or modification of his action and then to carry out fully the revised instructions or changed policy is perhaps the fundamental test of loyalty in an organization and definitely indicates that individual's capacity to perform the duties of a supervisor.

35 Veteran Preference and What Navy Must Do About It

At this point, it desired to discuss the preference accorded veterans in original employment and in retention.

It must be accepted that veteran preference is not fully consistent with a strict merit system. A merit system presupposes that the *best* qualified persons will be appointed to and retained in government service. However, it was the opinion of the great majority of the public and of the Congress that the principles of the merit system should be modified in order to give preference to veterans. The theory, of course, is that such preference is the least return which can be given to those who have borne arms in defense of the country, suffered injuries, and by such service have been deprived of opportunities for employment or advancement. Since the President, Congress and the public have clearly indicated this opinion by enactment of law, the Navy Department must willingly and effectively follow the letter and the spirit of this law. Because the Navy is an Armed Service, its responsibility to the veterans is even greater than that of most Government agencies. The Navy's actions will be scrutinized very closely.

The Department's policy on veterans preference, stated in NCPI 245.3 is as follows:

> "a. The policy of the Navy Department is to cooperate willingly and completely in carrying out the letter and the spirit of the statutes and regulations which accord veterans preference. This policy requires that:
>
> (1) The rights and privileges accorded veterans by law and regulations be extended ungrudingly and without discrimination.
>
> (2) Within the limitation of law and regulations and within the dictates of good management, every practical consideration be given to preference eligibles whenever an administrative action of a discretionary nature is to be taken.
>
> (3) Reasonable requests of veterans be granted if administratively feasible.
>
> "b. Ignorance of the law and the policy shall be corrected. It is the responsibility of all heads of activities to assure that administrative actions of their subordi-

nates are not taken in ignorance of the rights of preference eligibles. Personal non-agreement with the law or policy must not influence any official's administrative action."

36 all levels of Navy management must cooperate loyally and effectively to carry out the above policy.

Management must likewise be alert to future complex employment problems involved in the according of veteran preference.

If the theory upon which veteran preference is based is examined, it appears that not too much harm to the principles of sound management has been done. It is becoming more and more a concept of industrial relations that the most for which management can ask is a "satisfactory" employee and that as between satisfactory employees, distinctions as far as retention in employment should not be based upon slight shadings in efficiency ratings. In private industry, to a great extent, lay-offs of "satisfactory" employees are usually based upon length of service. In the Government, veteran preference has been given top priority. The veteran preference law requires that if a veteran is doing a "good" or satisfactory job he should not be laid off while there is work to be done and non-veterans can be laid off.

Certain statistics bearing on veteran employment in the continental naval shore establishments are pertinent. In August 1945, the total Navy continental civilian employment was 655,386. Of that number, 70,387 or 10.7 per cent had veteran preference. As of 30 March 1946, employment had dropped to 491,659. Of this number the employees possessing veteran preference had increased to 165,529 or 33.7 per cent of the total employment. This increase results, of course, both from the employment and retention regulations.

Veterans are given preference in original employment and when reductions in force occur, veterans are again given preference. The Navy is, therefore, increasing the percentage of veterans by new hires and at the same time decreasing the number of non-veteran employees by the opera-

tion of the regulations pertaining to reduction in force. Reduction in force regulations promulgated by the Civil Service Commission under authority of the Veterans' Preference Act of 1944 are based upon the concept that retention in Government service is to be determined by other factors as well as efficiency ratings. These factors are status, veteran preference, and seniority. Under present regulations, status will soon cease to be an important consideration since it will not be very long before all War Service appointees will be replaced. Therefore, in effect the regulations say that, between fully satisfactory employees, veterans will be retained in preference to nonveterans. As between fully satisfactory veterans (or nonveterans as the case may be) management will retain in employment those with the longest Government service. This is the general pattern. Because it was recognized that certain exceptions to this general pattern would have to be made if operation and ability to do required work in some cases was not to be irreparably impaired, it was provided that this pattern could be modified in those cases where it could be substantiated that reasonable grounds existed for an exception. This is called the Prudential Rule, and is fully quoted herewith from NCPI 170: "EXCEPTIONS • • •.—

37 In unusual situations, an employee performing necessary duties which cannot be taken over by another available employee with higher retention preference without undue interruption to the work involved may be retained, even though employees with higher retention preference may be affected. A written statement of the reasons for such exceptions shall be made a matter of record and shall be available upon request for inspection by employees adversely affected and for review by representatives of the Civil Service Commission."

It is as much the responsibility of management to make use of this rule, when needed, as to refrain from its use when not needed. It was not the intent of the Civil Service

Commission nor is it the intent of the Navy Department that there be a blind following of the general pattern in reduction in force when such a course will cause substantial harm to the mission of the Navy. On the other hand, the Prudential Rule should not be used as a means of evading the principles of the reduction in force regulations. Such action will lead only to criticism of the Navy and may lead to an abolition of the Prudential Rule.

Loss of Highly Skilled Employees Through Reduction in Force

It is, of course, inevitable that, under present regulations, many highly skilled employees will be lost. It is true that these same highly skilled employees are to a great extent responsible for the fact that our old line stations have developed, to a high degree, the ability to handle unusual and unique industrial task. The older machinists, electricians and employees possess of skill in other trades could be depended upon to perform the most difficult tasks and to produce articles of highest quality dependable in service. Since a large part of the Navy's industrial operations is of a jobbing nature and of a highly specialized nature, it is indeed fortunate that this skill and ability had been well developed before the war. It is also true that the Navy was able to rapidly establish new stations at the outbreak of war because it had highly skilled personnel to call upon to serve as a nuclear force at each of the new stations. Of course, the skills and ability of individuals are independent of whether they are veterans or non-veterans. While many employees were veterans of World War I, they were, in fact, but a small percentage of the total force when World War II began. Therefore, it is safe to say that, to a large extent, the efficiency of operation of our old line stations depended on the well-developed skills of non-veterans.

The Navy is now faced with the loss of many of these skilled persons. For the most part, veterans of World War II will be the replacements. Some of the veterans will be unskilled and others will be skilled, but in few cases will

they have the necessary well-rounded experience required to meet the many complex industrial problems of jobbing activities. Without question, stations face a period of
38 reduced overall quality and reduced ability to perform complicated and difficult tasks. The *exact degree* of this loss of ability cannot be measured. How long this period of lessened ability will continue is unknown also. It will continue until the veterans now being retained in employment or newly employed absorb the "know-how" and develop the ingenuity and high skill which the old timers had.

This period of lessened efficiency is inevitable unless it can be assumed that Congress will modify the present employment and retention provisions. To assume that such a modification will occur is not realistic. The task, therefore, of naval management is to recognize the situation as it is, and to take action that a stable and improved condition may be established as quickly as possible. It cannot be overemphasized that veteran preference is here to stay.

Navy's Task of Rebuilding a Highly Skilled Work Force

It should be recognized that, by and large, the best of the Nation's manhood entered the armed forces. If this is so, it appears that among the veterans there is a source of labor which, if properly handled, will in the final end result in a stable and highly skilled work force. It is the urgent task of management to accept this type of veteran and, after employment, give him the necessary help, supervision and training to enable him quickly to become a fully qualified and skilled employee. If management meets this responsibility, the result will be to rebuild rapidly the high standard of performance of shore stations.

Under any circumstances this will not be an easy task and will not be accomplished except as a result of hard work carried on by alert management over a period of years. Certainly a major tool that management must use is a comprehensively organized Industrial Relations Division strong in every aspect of employee relations. At least to some extent the Navy is facing a period somewhat parallel

to that which prevailed in 1940. Many new employees will require assistance and specific or special training in their tasks and jobs. The Navy knows by experience that the apprenticeship system for the basic trades will produce skilled and well-rounded employees. Therefore, it follows that in the coming years the Navy must foster and encourage apprenticeship training to the maximum possible extent. It should be realized, however, that apprenticeship training in itself is not the complete answer. Truly effective supervisory, "on-the-job" and other training programs must be planned, organized and directed. The key to the earliest solution of this problem must have as its basic foundation the training of these new employees, the majority of whom will be veterans.

39 ACTION REQUIRED

While it is recognized that the matter of obtaining a complete understanding and acceptance of the above concepts at all levels of management will undoubtedly require time, the Department urges that all possible efforts be exerted immediately toward the attainment of this objective. It is believed that a proper and prompt application of the above general concepts to specific problems as they arise will serve to resolve such problems fairly and conclusively.

40 **Filed Mar 14 1947**

Exhibit G.

PRESS RELEASE

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

Press Relations Phone RE-5711, Ex. 497, 612, 613, Room 132, Tariff Bldg, Corner 7th and F, NW.

January 17, 1947.

FOR RELEASE
AFTERNOON PAPERS
MONDAY, JANUARY 20, 1947

More than half the civilian men employed by Federal agencies have seen military service, stated the U. S. Civil Service Commission. At the end of November 1946, in the continental United States, there were 781,400 men veterans, or 53 percent of 1,477,400 men employees. These figures contrast sharply with those of a year ago, November, 1945, when men veterans numbered 496,100 and represented 31 percent of men employees.

Thirteen of the 26 agencies with over 1,000 men employees on their staffs in November 1946 reported that 50 percent or more of the men had been in the armed forces. The War Department counted the largest number of men veterans within its ranks (184,400), while the Veterans Administration showed the highest proportion of men veterans among its men employees (86 percent).

As might be expected, proportionately few women Federal civilian employees have seen military service. Women veterans numbered 33,500 in November 1946, or only 7 percent of all the women employed. Of all veterans in Federal service, women veterans represented only 5 percent.

More than two-thirds of the ex-service employees participated in World War II. This group of recent veterans totaled 547,100 in November 1946. This figure represents 4 percent of World War II veterans in the total population,

as reported in November by the Veterans Administration.

The proportion of men veterans of World War II to total employees is higher in Federal employment than in civilian industrial and agricultural employment. The proportion of men with service in World War II amounted in November 1946 to 26 percent of all Federal employees. According to the Bureau of the Census in November, 19 percent, or 10,680,000 of the 57,040,000 persons in total civilian employment were World War II men veterans. In relation to the men employed in Federal service, World War II men veterans accounted for 35 percent, while among men in all kinds of civilian employment recent men veterans represented 26 percent of the total.

Both the number and proportion of veterans in Federal service moved up rapidly after VJ-Day, while total Federal employment declined substantially. Veteras employment increased from 464,300 in August 1945 to a peak fo 836,500 in July 1946, then decreased to 819,900 in November 1946. Meanwhile, total Federal employees in this country declined continuously from 2,851,500 in August 1946 to 2,017,500 in November 1946, a net decrease of 834,000.

The majority of veterans—650,200, or 79 percent in November—are employed in the four largest Federal agencies. Among all agencies, the Veterans Administration reported the highest proportion (60 percent) of former service people.

TABLE 1

FEDERAL CIVILIAN EMPLOYMENT, BY VETERAN STATUS

Continental United States

Date	Total Employment	Veterans		Non-Veterans	
		Number	Percent	Number	Percent
1944: November	2,876,004	416,611	14	2,459,393	86
1945: November	2,456,210	519,246	21	1,936,964	79
December	2,411,015	558,762	23	1,852,253	77
1946: January	2,405,985	619,192	26	1,786,793	74
February	2,402,221	673,230	28	1,728,991	72
March	2,379,384	728,266	31	1,651,118	69
April	2,393,634	783,607	33	1,610,027	67
May	2,399,855	814,716	35	1,585,139	65
June	2,299,007	817,175	36	1,481,832	64
July	2,282,328	836,485	37	1,445,843	63
August	2,232,461	834,854	37	1,397,607	63
September	2,153,785	825,036	38	1,328,749	62
October	2,118,983	825,881	39	1,293,102	61
November	2,017,535	819,896	41	1,197,639	59

TABLE 2

FEDERAL CIVILIAN EMPLOYMENT, BY SEX AND VETERAN STATUS

November 30, 1946

Continental United States and Washington Area

	Total Employment		Men		Women	
	Number	Percent	Number	Percent	Number	Percent
Total, Continental U. S.	2,017,535	100	1,477,392	100	540,143	100
Veterans	819,896	41	781,374	53	38,522	7
Non-Veterans	1,197,639	59	696,018	47	501,621	93
Total, Washington, D.C. Metropolitan Area	224,110	100	117,344	100	106,766	100
Veterans	69,718	31	63,551	54	6,167	6
Non-Veterans	154,392	69	53,793	46	100,599	94

U. S. Civil Service Commission
January 1947

Exhibit H

TOTAL EMPLOYMENT GOES DOWN.... ....VETERAN EMPLOYMENT GOES UP!

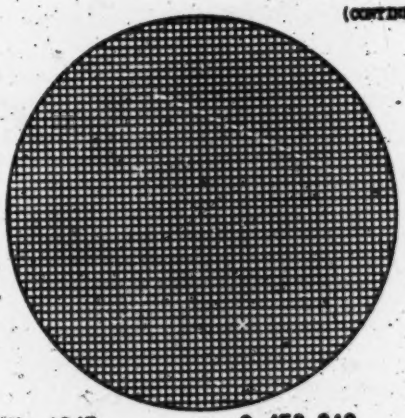
(CIVILIAN EMPLOYMENT, EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT FOR YEAR ENDED NOV.30,1946)

United States Civil Service Commission

FILED
MAR 14 1947
CHARLES E. STEWART, Clerk

TOTAL EMPLOYMENT

(CONTINENTAL U.S.)



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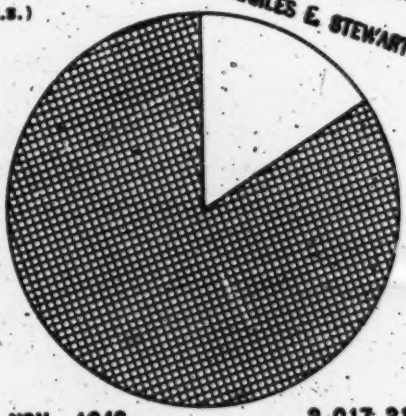
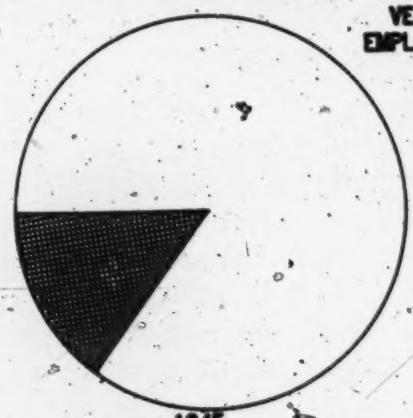
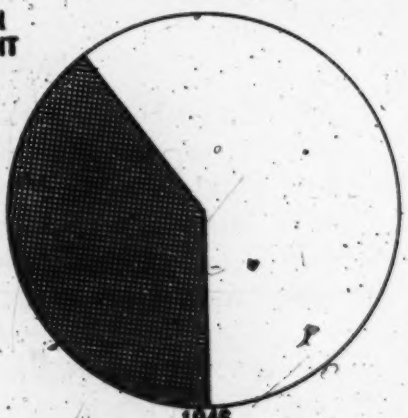


NOV. 1946.....2,017,210

VETERAN EMPLOYMENT



1945
519,246 JOBS OUT OF 2,456,210



1946
819,896 JOBS OUT OF 2,017,210

(5)

45 Filed Mar 31 1947

Defendants' Motion for Summary Judgment

Now come the Defendants, James V. Forrestal, Secretary of the Navy, Harry B. Mitchell, Frances Perkins, and Arthur S. Flemming, Members of the United States Civil Service Commission, by their attorneys, and move the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

JOHN F. SONNETT,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney,
Attorneys for Defendants.

Of Counsel:
JOSEPH M. FRIEDMAN,
Special Assistant to the Attorney General.
JULIUS FRIEDENSON,
Attorney, U. S. Civil Service Commission.

46 Filed May 6 1947

Informal Memorandum

The court thinks the regulations complained of are consistent with the letter and spirit of the Veterans' Preference Act and are in harmony with the Congressional purpose as indicated by the legislative history of the act. The regulations seem to be born of a governmental policy which has continued from the early days of the Republic. It appears in statutes, regulations and executive orders.

The existing law was designed to codify the policy of the Government with relation to veterans' preference in governmental employment. It was the purpose of Congress to put in one statute all provisions granting military preference in connection with civilian employment by the Government; that there might be statutory authority for the pref-

erence granted veterans in connection with appointment and retention in civilian positions under a reduction in force of governmental employees.

47 It would seem that the interpretation of the Veterans' Preference Act by the Commission is correct and that the regulations which it has promulgated are entirely proper and quite necessary to the administration of the act.

Counsel for defendants will present an order sustaining the motion of defendants for summary judgment and overruling the motion of plaintiff for summary judgment.

F. DICKINSON LETTS,
Justice.

48 Filed May 9 1947

Order

Upon consideration of plaintiff's motion for summary judgment, the affidavit and points and authorities in support thereof, the defendants' motion for summary judgment, and points and authorities in support thereof, heretofore filed herein, upon argument of counsel in open court, and upon all the proceedings herein, and consideration thereof, it is, by the Court this 9th day of May 1947,

ORDERED, ADJUDGED AND DECREED that, in accordance with the ruling made by the Court in this cause on May 6, 1947, as set forth in its informal memorandum of that date, plaintiff's motion for summary judgment be, and the same hereby is, denied, and defendants' motion for summary judgment be, and the same hereby is, granted.

F. DICKINSON LETTS,
Justice.

Approved as to form:
JOSEPH M. FRIEDMAN,
Counsel for Defendants.
MORTIMER KOLLENDER,
Counsel for Plaintiff.

Dated May 9, 1947.

[fol. 53] [File endorsement omitted]

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9554

EARLE W. HILTON, Appellant,

v.

JAMES V. FORRESTAL, Secretary of the Navy, et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

OPINION—December 29, 1947

Argued November 19, 1947

Mr. Walter B. Wilbur for appellant.

Mr. Joseph M. Friedman, Special Assistant to the Attorney General, with whom Mr. Herbert A. Bergson, Acting Assistant Attorney General, Mr. George Morris Fay, United States Attorney, and Mr. Julius Friedenson, Special Assistant to the Chief Law Officer, Civil Service Commission, were on the brief, for appellees. Mr. Sidney S. Sachs, Assistant United States Attorney, also entered an appearance for appellees.

Mr. Joseph A. Carey filed a brief on behalf of the Veterans of Foreign Wars of the United States as *amicus curiae*, urging affirmance.

Before Groner, C. J., and Edgerton and Prettyman, JJ.

PRETTYMAN, J.:

Appellant brought a civil action in the District Court for a declaratory judgment.[1] He alleged that he is a civil service employee of the United States Government at the Charleston, South Carolina, Navy Yard, with permanent status and with twelve years continuous and satisfactory service; that on November 8, 1946, he was placed in furlough status for one year, pursuant to regulations promul-

[1] 48 Stat. 955 (1934), as amended, 28 U. S. C. A. § 400 (Supp. 1946).

gated by the Civil Service Commission purportedly pursuant to Section 12 of the Veterans' Preference Act of 1944,[2] governing reductions in force among Federal Government personnel. He asserted that the regulations are void as contrary to the statute, and prayed that the court so declare and direct appellee-defendant Secretary to restore him to his office. The District Court gave summary judgment for defendants.

Section 12 of the Veterans' Preference Act provides as follows:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be [fol. 54] released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: . . ."

The pertinent regulation issued by the Civil Service Commission is set forth below:[3]

---

[2] 58 Stat. 390, 5 U. S. C. A. § 861 (Supp. 1946).

[3] 5 CFR (1945 Supp.) § 12.303:

"*Retention preference; classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows:

"*Group A*: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from

Appellant says that the regulations are void because they give absolute preference to veterans with permanent tenure (Class A-1), whereas the statute requires that due effect must also, and equally, be given to length of service and efficiency ratings.

The question before us is whether the regulations are reasonable under the statute. It is true that the Commission has given "due effect" to the four statutory factors by a sort of seriatim application. First there is a classification by tenure; then a sub-classification by veterans' preference; then a sub-classification by efficiency ratings; and within the sub-classifications length of service is applied. [fol. 55] We cannot say that this is an unreasonable method of applying the wholly general directives of the statute. We cannot, therefore, hold the regulations void.

At the same time, we do not think, as appellees argue, that the regulations as drawn represent the only possible method of applying the statute. The proviso in Section 12 is that preference employees shall be retained in preference to all other "competing" employees. We think that that refers to employees competing within the bounds of such classifications as the Commission may establish by

---

absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

"A-1 Plus during one-year period after return to duty, as required by law.

"A-1 With veteran preference unless efficiency rating is less than 'Good'.

"A-2 Without veteran preference unless efficiency rating is less than 'Good'.

"A-3 With veteran preference where efficiency rating is less than 'Good'.

"A-4 Without veteran preference where efficiency rating is less than 'Good'.

"*Group B:* All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

regulations, giving "due effect" to the four factors named. The regulations as drawn refer to "competitive retention groups and subgroups". The Commission could establish classifications, or groups, by a composite consideration of the four factors, and only those employees falling within a particular classification or group would be "competing".

From a practical point of view, we think that Congress meant to give the Commission a wide measure of discretion in the formulation of rules to deal with the difficult administrative problem arising from the reduction of federal employees and the complications of veterans' rights. It did not, we think, mean to foreclose the Commission by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel. But we think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive, the courts must leave it there.

Affirmed.

"B-1 With veteran preference unless efficiency rating is less than 'Good.'

"B-2 Without veteran preference unless efficiency rating is less than 'Good'.

"B-3 With veteran preference where efficiency rating is less than 'Good'.

"B-4 Without veteran preference where efficiency rating is less than 'Good'.

"*Group C*. All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

"C-1 With veteran preference unless efficiency rating is less than 'Good'.

"C-2 Without veteran preference unless efficiency rating is less than 'Good'.

"C-3 With veteran preference where efficiency rating is less than 'Good'.

"C-4 Without veteran preference where efficiency rating is less than 'Good'.

[fol.56] [File endorsement omitted]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1947

No. 9554

EARLE W. HILTON, Appellant,

vs.

JAMES FORRESTAL, Secretary of the Navy, Et Al., Appellees

Appeal from the District Court of the United States for the District of Columbia

Before Groner, C. J., and Edgerton and Prettyman, JJ.

JUDGMENT—December 29, 1947

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Prettyman.

Dated: December 29, 1947.

[fol. 57] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1948

No. 9554

ORDER OF SUBSTITUTION—January 19, 1948

On consideration of appellant's motion to substitute John L. Sullivan, Secretary of the Navy, as appellee herein in the place of appellee Forrestal on the ground that appellee Forrestal vacated the office of Secretary of the Navy on September 17, 1947, when he took office as Secretary of Defense, and John L. Sullivan took office as Secretary of the Navy September 18, 1947, and it being alleged that there is substantial need for continuing and maintaining this

cause and obtaining adjudication of the questions involved, and it appearing that counsel for appellees and for John L. Sullivan present Secretary of the Navy, consent to the motion to substitute, it is now, therefore,

Ordered by the Court that John L. Sullivan, Secretary of the Navy, be, and he is hereby, substituted as appellee herein in the place of appellee Forrestal.

PER CURIAM.

Dated: January 19, 1948.

[File endorsement omitted.]

[fol. 58] [File endorsement omitted]

[Stamp:] United States Court of Appeals for the District of Columbia—Filed January 9, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed —— 19, 1948

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. Opinion.
3. Judgment.
4. Order for substitution of party.
5. This designation.
6. Clerk's certificate.

Charles Fahy, 1625 K Street, N. W., Washington, D. C., Attorney for Appellant.

Copy of the foregoing received, and service thereof is acknowledged, at the Department of Justice, Washington, D. C., this 9th day of January, 1948.

Philip B. Perlman, Solicitor General, Attorney for Appellees.

[fol. 59] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 59, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellant in the case of Earl W. Hilton, Appellant, vs. John L. Sullivan, Secretary of the Navy, et al., Appellees, No. 9554, January Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this nineteenth day of January, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 60] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 560

EARLE W. HILTON, Petitioner,

vs.

JOHN L. SULLIVAN, Secretary of the Navy, FRANCES PERKINS, et al., Members of the Civil Service Commission

ORDER ALLOWING CERTIORARI—Filed March 8, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted.

And it is further ordered that the duty certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 560

EARLE W. HILTON, *Petitioner*

v.

JOHN L. SULLIVAN, Secretary of the Navy, and FRANCES PERKINS, HARRY B. MITCHELL, ARTHUR FLEMMING, Members of the Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Attorneys for Petitioner

January, 1948.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JOHN L. SULLIVAN, Secretary of the Navy, and FRANCES PERKINS, HARRY B. MITCHELL, ARTHUR FLEMMING, Members of the Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Earle W. Hilton, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled cause on December 29, 1947.

Opinion Below.

The opinions of the United States District Court (R. 52) and the United States Court of Appeals (R. 54) for the District of Columbia have not been officially reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347 (a).

Questions Presented.

1. Whether the regulations for reduction-in-force in Federal Government employment, as here applied, may be upheld as a valid exercise of discretion under Section 12 of the Veterans Preference Act, notwithstanding that they were established by the Civil Service Commission in the mistaken belief they were required by law.

2. Whether the "superseniority" granted veterans of World War II in Federal Government employment for one year after return from military service, in preference to all other employees, veteran or non-veteran, with permanent tenure, is required or authorized by Section 8 of the Selective Service Act.

3. Whether the regulations of the Civil Service Commission for reduction-in-force in Federal Government employment, as here applied, are required or authorized by Section 12 of the Veterans Preference Act.

Statutes and Regulations Involved.

Section 12 of the Veterans Preference Act of 1944 (Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U. S. C. Supp. V, Sec. 861) provides as follows:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited

in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions".

Section 8 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended, provides:

"...

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service . . . —

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; . . .

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be

> entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration".

Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U. S. C. Sec. 652) provides:

> "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service. . . ."

The pertinent sections of the reduction-in-force regulations of the United States Civil Service Commission promulgated under Section 12 of the Veterans Preference Act of 1944 and applied herein (5 CFR (1945 Supp.) §12.301 *et seq.*) are set forth *infra*, p. 5.

Statement.

Petitioner was employed in the United States Navy Yard at Charleston, South Carolina, with permanent status in the classified civil service (R. 4). On January 7, 1946, he was demoted from his position of Shipfitter, Leadingman at $12.08 per diem, to Shipfitter, Maximum at $10.08 per diem (R. 4), and on November 8, 1946 was furloughed without pay for a period of one year in consequence of reductions of personnel in the Navy Yard carried out in accordance with regulations of the United States Civil Service Commission (R. 23). Petitioner had rendered more than twelve years of service as a skilled workman in the shipfitters shop at this Yard, and had an efficiency rating of "Excellent" (R. 5, 11). He was not entitled to preference on account of military service (R. 11).

The regulations of the Commission covering reductions in force provide that employees in each "competitive level" shall be divided into three "retention groups" based upon the nature of their tenure of employment, as follows:

Group A, employees who have met all requirements for indefinite retention in present positions;

Group B, employees serving under appointments with a time limitation which exceeds one year;

Group C, temporary employees serving under appointments with time limitations of one year or less (Sec. 12.303).

Each such group is then divided into subgroups according to military service and—except for sub-group A-1 Plus—efficiency rating. Group A is accordingly subdivided as follows:

"A-1 Plus. During one-year period after return to duty, as required by law.

"A-1 With veteran preference unless efficiency rating is less than 'Good'.

"A-2 Without veteran preference unless efficiency rating is less than 'Good'.

"A-3 With veteran preference where efficiency rating is less than 'Good'.

"A-4 Without veteran preference where efficiency rating is less than 'Good'." (*Id.*)

Within each of these subgroups employees are assigned retention credits by allowing one point for each full year of Government service (including military service), and five additional points for an "excellent" efficiency rating (Sec. 12.302(c)).[1] Employees are listed in their respective subgroups in the order of total number of retention points. Reductions in force are made by starting with the lowest subgroup, that is, Subgroup C-4, and eliminating in inverse order of the number of their retention credits. All employees in a lower sub-group must be eliminated before

[1] Effective Sept. 15, 1946, 3 points were added for an efficiency rating of "very good", and 1 point for "good". Regulations, Sec. 20.2(c), 12 F. R. 1291 (Feb. 25, 1947).

those in the next higher sub-group are reached (Secs. 12.307, 12.308).

Petitioner was placed in Sub-group A-2 on the retention registers (R. 22, 31). At the time of his furlough without pay, the regulations gave higher retention priority to 57 employees in sub-group A-1 (R. 29-30) and 118 employees in sub-group A-1 Plus (R. 26-29). Of those in sub-group A-1 Plus, 2 were listed with efficiency ratings of "excellent" (R. 26), 54 were "good" (R. 26-28), and 61 were listed "no efficiency" (R. 28-29). Non-veterans with ratings of "no efficiency" were placed below sub-group A-2 on the register, and therefore furloughed before petitioner was reached (R. 33).

Petitioner brought this action in the United States District Court for the District of Columbia, for a declaratory judgment that the regulations as applied to him were beyond the scope of respondents' authority, and for other relief (R. 3). After answer (R. 7), both petitioner and respondents moved for summary judgment on the ground that no genuine issue as to any material fact was presented and that judgment be given as a matter of law (R. 10, 52). The District Court denied the motion by the petitioner, and granted summary judgment for the respondents (R. 53), based on a memorandum opinion that the regulations complained of were consistent with the purpose, letter and spirit of the Veterans Preference Act (R. 52). Final order was entered May 9, 1947 (R. 53). On appeal the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 57). Its opinion declared that the Commission's regulations were not the only possible method of applying the Act, as the Commission had contended, but nevertheless were not an unreasonable application of the discretion vested in that agency by the Act (R. 56).

Specification of Errors to be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that sub-groups A-1 Plus and A-1 of the regulations for reduction-in-force of Federal Government employees as here applied were within the discretion of respondents civil service commissioners, and in affirming the judgment of the district court upon that ground, notwithstanding that respondents established those sub-groups in the mistaken belief they were required by law.

2. In failing to hold that sub-groups A-1 Plus and A-1 of the reduction-in-force regulations as here applied were not required by either the Selective Service Act or the Veterans Preference Act, and in failing to invalidate those sub-groups on the ground they had been established by respondent civil service commissioners in the mistaken belief they were respectively required by those laws.

3. In holding that Section 12 of the Veterans Preference Act required or authorized sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans were retained in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of efficiency ratings or seniority.

4. In holding that Section 12 of the Veterans Preference Act required or authorized sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby veterans with ratings of "no efficiency" were retained as shipfitters in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that

Navy Yard, veteran or non-veteran, regardless of their higher efficiency ratings and greater seniority.

5. In holding that Section 12 of the Veterans Preference Act of 1944 required or authorized sub-group A-1 of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans with efficiency ratings of "good" or better were retained in the Charleston Navy Yard in preference to petitioner and other shipfitters in that Navy Yard who are non-veterans but had higher efficiency ratings and greater seniority.

6. In affirming the judgment of the district court denying petitioner's and granting respondents' motion for summary judgment.

7. In failing to reverse the judgment of the district court, with direction for appropriate relief based on the invalidity of the regulations as here applied.

Reasons for Granting the Writ.

I.

In upholding the absolute retention priority of employees in sub-group A-1 Plus, as a matter of law or discretion, the court below decided an important question under the Selective Service Act and the Veterans Preference Act, and failed to give proper effect to applicable decisions of this Court.

a. The regulations in question grant the maximum priority, or "super-seniority", to World War II veterans, in preference to other veterans as well as all non-veterans, "during one-year period after return to duty, as required by law" (Sub-group A-1 Plus, Sec. 12.303). It is plain that the Commission established this sub-group as a matter of law rather than discretion, and that the "law" referred to is other than Section 12 of the Veterans Preference Act. The Commission has informed the Attorney General that

"at the time the A-1 Plus category was established, that action was regarded as required by the provisions of section 8" of the Selective Training and Service Act. 40 *Op. Atty. Gen.* No. 115 (Sept. 20, 1946) p. 4. To the same effect are *62nd Annual Report of the Civil Service Commission* (1945) p. 20; *Federal Personnel Manual* (U. S. Civil Service Commission), R. 6-2.

Thus, the Commission has predicated sub-group A-1 Plus upon the supposed requirements of the Selective Service Act rather than upon any supposed discretionary authority stemming from the Veterans Preference Act. Nevertheless the court below sustained sub-group A-1 Plus upon the opposite grounds; namely, that it was discretionary under the statute, although not "the only possible method" of applying it (R. 56). It is submitted that the court below erred in not confining itself to the validity of the mandatory ground upon which the Commission itself rested its action, since the agency has misconceived the law rather than exercised its judgment in an area which Congress had entrusted to it. See *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 88, 94-5; *cf. United States* v. *Carolina Carriers' Corp.*, 315 U. S. 475, 488-9. It is submitted that this error calls for review by this Court to determine the important question otherwise left unresolved, whether sub-group A-1 Plus is required by law; and that if not required by law, that sub-group should be set aside regardless of whether it might be sustained were it the product of the exercise of permissible discretion. *Id.; Securities & Exchange Commission* v. *Chenery*, 332 U. S. 194.

b. That sub-group A-1 Plus is not required by the Selective Service Act is obvious from applicable decisions of this Court, which have rejected respondents' contention that the Act grants veterans such extraordinary retention privileges or "super-seniority" when a bona fide reduction in force becomes necessary during the first year following their return to duty after honorable discharge from military service. While the Selective Service Act is to be liber-

ally construed for the benefit of veterans, it did not intend to grant a step-up or gain in priority over what the veteran would have had if he had never entered the armed forces. *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 285-289. The *Fishgold* case affords no basis for respondents' argument below that the principle established should be limited to very brief layoffs comparable to the nine-day periods there involved, and in no event longer than 30 days, which is the minimum for operation of the Commission's reduction-in-force regulations.[2]

The subsequent opinion in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, reiterated that the job guarantee for the statutory period did not apply to a veteran who "simply had been deprived of the opportunity to work by operation of the seniority system when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his full standing under the Act". 331 U. S. at 56. The contention for super-seniority within the statutory period was deemed on a par with that for statutory protection beyond one year. The Court did not believe that Congress had in mind such far-reach-

[2] The Attorney General has ruled that Section 8 of the Selective Service Act requires the reinstatement and retention of a returning veteran for one year, even in preference to other veterans of World War II with greater seniority. 40 Op. Atty. Gen. No. 115 (Sept. 20, 1946). His opinion assumes that "underlying the reduction in force regulations is a determination by the Civil Service Commission that 'separation' or 'furlough for over thirty days' are actions constituting a 'discharge'." (p. 7.) This conclusion is contrary to the clear distinction between being placed on "furlough status" for one year and being "separated in reduction of force", drawn under the *Fishgold* decision (328 U. S. at 286-7), the regulations of the Civil Service Commission (Sec. 12.309 (a)), and the notice of the Navy Department herein (R. 23-24). For example, unlike the employee absolutely separated, the furloughed employee in sub-group A-1 or A-2 is placed on a preference list for reinstatement before any original appointments may be made to such positions; and he may not receive a refund of his retirement deductions. More recent regulations make mandatory the one-year notice rule for furloughed employees in sub-groups A-1 and A-2. Sec. 12.309(a), 12 F. R. 59 (Jan. 4, 1947.)

ing consequences for the nation-wide system of employment, both *public and private*, when making statutory provisions for the veteran's benefit''. 331 U. S. at 57 (italics supplied).

For purposes of the instant case, petitioner's superior retention rights by operation of law have the same effect as the non-veterans' superior seniority rights under private contracts in the cases cited. See *Trailmobile Company* v. *Whirls*, *supra*, 331 U. S. at 53, note 21.

c. The result is no different even assuming that respondents may properly urge here the validity of sub-group A-1 Plus under Section 12 of the Veterans Preference Act, as a matter of law or discretion. In establishing sub-group A-1 Plus, the Commission ignored completely the requirement of that section that ''due effect'' be given length of service and efficiency, along with tenure and military preference. And whatever may be the scope of the second proviso (pp. 13-20, *infra*), it is assuredly based on elements of comparative efficiency which were likewise ignored by the Commission in placing all returned veterans in sub-group A-1 Plus for one year. Shipfitters who were veterans in sub-group A-1 Plus were given retention rights superior to all other shipfitters in the Charleston Navy Yard, whether veterans in sub-group A-1 or non-veterans in sub-group A-2, regardless of the ''excellent'' or ''good'' efficiency ratings of all the employees in the latter sub-groups, and the higher seniority of many of them, including petitioner (R. 28-33).

Apart from the validity of sub-group A-1 Plus as a whole, there was no statutory authority for placing in that category 61 employees with ratings of ''no efficiency'' (R. 28-29). Non-veterans with ratings of ''no efficiency'' were placed below sub-group A-2 on the register (R. 32), and hence were furloughed before petitioner and others in his sub-group were reached. And on respondents' own construction, Section 12 at best gives absolute preference in retention to veterans with efficiency ratings of ''good or

better", and also at best gives veterans with efficiency ratings below good, absolute preference over non-veterans with equal or lower ratings.

Sub-group A-1 Plus as here applied thus finds no support either in the requirements of Section 12 of the Veterans Preference Act or in any supposed discretion flowing therefrom.

II.

In upholding the retention priority of employees in sub-group A-1 in the reductions-in-force herein, the court below erred in deciding a question of general importance relative to the Veterans Preference Act which has not been, but should be, settled by this Court.

a. Sub-group A-1 was not required by law, as the Commission believed when establishing its regulations. Respondents brief below argued that "Congress . . . did not see fit to allow the Commission any administrative latitude in this matter. It has expressly and explicitly prescribed the exact effect which shall be accorded military preference" by the second proviso to Section 12, which is said to "command" the establishment of sub-group A-1.[3] But this

[3] The absolute preference accorded military service is in marked contrast to the flexibility evidenced by the Commission in determining the relative weight given length of service and efficiency. The regulations first issued under the Act gave 1 retention credit for each year of service, plus points for efficiency weighted at 80 for "good"; 88 for "very good", and 96 for "excellent". Thus "an employee with a rating of 'very good' has an advantage over a 'good' employee equal to 8 years of seniority. An 'excellent' employee has an advantage over a 'good' employee equal to 16 years of seniority". See *Questions and Answers on New Reduction-in-Force Regulations*, U. S. Civil Service Commission Release (Aug. 8, 1944); Departmental Circular No. 510, Sec. 2 (Nov. 15, 1944), 9 F. R. 13699. Increased weight was later given to length of service in relation to efficiency, by allowing one point for each year of service plus 5 points for "excellent" efficiency rating. Regulations, Sec. 12.302(c), 10 F. R. 12181 (Sept. 27, 1945). This was in turn amended by adding 3 points for efficiency ratings of "very good" and 1 point for "good". Regulations, Sec. 20.2(c), 12 F. R. 1391 (Feb. 25, 1947).

construction of the second proviso assumes the conclusion, which turns, as the court below recognized (R. 56), on the scope given the phrase "all other competing employees," in relation to "military preference."

Section 12 of the Veterans Preference Act requires that the Commission's regulations on reductions-in-force shall give "due effect", not to military service alone, but to *four* factors: "tenure of employment, military preference, length of service, and efficiency ratings". The persons accorded "military preference" are enumerated in Section 2, but the weight accorded that "preference" is defined and qualified in subsequent sections.

"Preference eligibles" are entitled to 5-point and 10-point differentials to be added to their earned ratings, except certain categories in the professional and scientific services (Sec. 3), and to be listed for appointment, reinstatement and reemployment in the order of their augmented ratings "ahead of all others having the same ratings". (Sec. 7, 15, 16). "Preference employees" are affected in two ways under Section 12: In transfers of function from one agency to another, the third proviso requires that they are transferred to the second agency "for employment in positions for which they are qualified", before "additional employees" are appointed "from any other source"; thus they cannot displace non-veterans already employed in the second agency. In event of reductions-in-force, the precise definition of the preference accorded is likewise established. By the first proviso, the length of time on active duty must be credited in computing total service for seniority purposes. By the second proviso, the weight to be given the factor of efficiency is qualified so as to equate a veterans rating of "good" with a competing non-veteran's rating of "good" or better. The factor of tenure lends itself readily to classification. The added retention credits accorded "preference employees" will thus depend upon the relative weight given length of service and efficiency ratings, and the manner of their classification or

grouping. Only those employees falling within a particular classification or group would be "competing" for purposes of the second proviso, as the opinion below points out (R. 56). In this way, we "construe the separate provisions of the Act as parts of an organic whole, and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits". *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 285.

Section 12 thus provides on its face standards whereby the four enumerated factors shall be given reasonable effect in combination. In no circumstances can the Section be read to authorize the regulations actually issued and applied, which give "military preference" in reductions-in-force an absolute effect accorded by the statute in none of the other situations enumerated above. Where Congress intended that veterans be given absolute preference under this Act, it used plain words manifesting that intention; for example, in the proviso to Section 3 whereby, in examinations for guards, elevator operators, messengers, and custodians "competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available". Congress recently declined to accept comparable language in Section 12 eliminating the requirement for "due effect" to efficiency and seniority, and subordinating them entirely to military service.[4]

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[4] H. R. 739, 80th Cong. 1st Sess., as introduced Jan. 9, 1947, read as follows: "Whenever reductions in personnel, reductions in grade, or demotions are necessary in any Federal agency, employees shall be released, reduced, or demoted on an agency-wide basis in accordance with Civil Service Commission regulations which shall give effect to the following categories in the order listed: First to military preference; second, to tenure of employment; third, to length of total Federal service; and, fourth, to efficiency ratings: . . . *Provided further*, That regardless of the above categories veterans-preference employees shall be retained in any Federal agency over all other employees: *Provided further*, That employees having equal standing in any of the above categories shall be released upon the basis of their relative standing in the next lower category: *Provided further*, That the length of

The court below expressly controverted the Commission's view that "the regulations as drawn represent the only possible method of applying the statute" (R. 56). Congress did not mean to foreclose the Commission, the court said "by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel" (R. 56). Thus the administrative agency here, as in *Securities and Exchange Commission* v. *Chenery case*, 318 U. S. 80, erred in basing its action on supposed compulsion of law. It is submitted therefore that the Commission's action cannot be sustained on appeal; since here as in subgroup A-1 plus, the agency has misconceived the law rather than exercised its judgment in an area which Congress had entrusted to it, *Supra* p. 9.

b. The Commission's regulation establishing sub-group A-1 misapplied the standards governing its discretionary authority.

The Veterans Preference Act, known as the Starnes-Scrugham Law, was the outcome of years of Congressional consideration. The version introduced by Congressman Starnes as late as 1943 required that in any reduction-in-force, employees within each classification to be reduced shall be released in the "inverse order of the length of their total federal service", the time spent in the armed forces being included in computing length of service (H.R. 882, 78th Cong. 1st Sess. Sec. 12). This was amended in the 1944 bill to conform substantially to the present language (H.R. 4115 and S. 1762, 78th Cong. 2nd Sess.), because the

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time spent in active service in the armed forces of the United States of each such Federal employee shall be credited in computing total length of Federal Service." As reported by the House Committee on Post Offices and Civil Service on July 16, 1947, and approved by the House, this language was amended to make only minor variations from existing law. Cong. Rec. (July 21, 1947) p. 9754.

Civil Service Commission advised the House sponsor and the House Committee it "does not believe that reductions in force should be made solely on the basis of length of service, but that consideration should also be given to the relative efficiency of the employee".[5]

The statute clearly provides standards whereby these two elements are to be considered and weighed in combination with tenure and military service. *Supra*, p. 13-14; *Cf. Packard Motor Car* v. *National Labor Relations Board*, 330 U.S. 485, 492. In no event does the relevant legislative background support respondent's construction of Section 12 in regard to sub-group A-1.[6] Respondents main reliance is on pre-existing statutes, executive orders or administrative regulations. These are of no avail, for the Act as a whole represents the first Congressional effort to write comprehensive legislation on the subject, and contains many changes from earlier practices[7]—changes which supersede all previous acts and parts of acts by virtue of Section 18. Respondent Sullivan has himself emphasized the "radical" differences in employment conditions and management policies brought about by the Commission's regulations in purported compliance with Section 12 of the Act (R. 35). The saving clause of Section 18 is inapplicable to reductions-in-force under Section 12, since it is de-

[5] Letter to Hon. Joe Starnes, Jan. 31, 1944, Press Release, U. S. Civil Service Commission, Feb. 2, 1944; H. Rpt. 1289, 78th Cong. 2nd Sess. (1944) pp. 5-6.

[6] See H. Rep. 1289 *supra*, pp. 4, 6; S. Rep. 907, 78th Cong. 2d Sess. (1944) p. 3. See also Hearings on S. 1762 and H. R. 4115, Committee on Civil Service, U. S. Senate (1944) p. 29.

[7] H. Rep. 1289, *supra*, p. 3. For example, Section 3 of this Act goes beyond pre-existing law by granting veterans absolute preference in certain employments. On the other hand, regardless of the Act of August 23, 1912 (37 Stat. 413), for example, Section 12 as currently construed by the Civil Service Commission does not afford veterans any preference against demotion, and does not prefer veterans with temporary or war service tenure over non-veterans with indefinite tenure. See also *62nd Annual Report of the United States Civil Service Commission* (1945) pp. 57-8.

signed merely to protect the standing of "peacetime soldiers" under pre-existing law and regulations.[8] The historical background of the statute thus gives no more support to the erroneous administrative construction of the Veterans Preference Act than did similar attempted analysis of the Selective Service Act in the *Fishgold* case. 328 U.S. at 289-290.

We are not confronted here with a borderline case in which veterans are preferred over non-veterans only slightly superior in seniority or efficiency. Petitioner had been employed in the Charleston Yard for twelve years and was rated "excellent" in efficiency (R. 5). He stood near the top of sub-group A-2 (R. 31), and had more retention credits than 131 other shipfitters out of 143 in subgroups A-1 and A-2 combined (R. 29-32). The bulk of the veterans retained had lower efficiency ratings and substantially lower seniority, even after crediting toward total length of service the years spent on active duty (R. 29-32).

Employment in the Charleston Navy Yard had increased from 7,000 in 1938 to 27,500 at the peak of war activity (R. 12). Before the war service regulations were instituted in 1942, only a six-months probationary period was required under Civil Service Rule VII 2(c) to establish permanent tenure for purposes of the present reduction-in-force regulations. Most of the new employees had not had the specialized knowledge to perform the skilled tasks of building, repairing, or maintaining naval war ships in the Yard during the war period. Approximately 85% of the employees now accorded "veterans preference" were without prior experience in shipbuilding, and were trained by the career civil service employees whom they have now displaced under the regulations here involved (R. 12). Only 2 of the veterans in subgroup A-1 Plus had ratings of "Excellent" (R. 26).

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[8] S. Rep. 907, *supra*, p. 2; H. Rep. 1289, *supra*, p. 3; Hearings on S. 1762 and H. R. 4115, Committee on Civil Service, U. S. Senate (1944) pp. 17, 60.

Experience throughout the Navy Yards emphasizes the serious impact of the Commission's regulations on efficiency of the service, particularly in the present period of international tension. The end of hostilities left the Navy with a gigantic and far-flung shore establishment approximately fifteen times larger than that existing in 1940. Within one year, civilian employment in the Navy Yards was reduced from 355,000 to 158,000 men. *Annual Report of the Secretary of the Navy* (1946) pp. 40, 35. Respondent Sullivan took occasion to stress the adverse consequences of the Commission's regulations under the Veterans' Preference Act (R. 45-46).

This outcome was never intended by Congress. It results from the Commission's regulations rather than the Act itself. It need not have occurred if the Commission had correctly construed the statutory standards for reductions-in-force as requiring a middle course, rejecting sole reliance on either seniority or military service, in line with Congressional rejection of the 1943 and 1947 veterans' preference bills based on these factors. *Supra*, pp. 14, 15.

Such a construction of Section 12 of the Veterans Preference Act is in harmony with the comprehensive post-war program developed by the Federal Government for the millions of World War II veterans, embracing aids toward employment and unemployment insurance, formal education, technical training, home or farm ownership and independent small business.[9] All are part of a broad-gauged plan framed so far as humanly possible to establish the veterans as citizens in a healthy national economy, but not as a group set apart from the general national interest.

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[9] See 58 Stat. 284, 38 U. S. C. Sec. 693; Statement by the President on Signing Servicemen's Readjustment Act (June 22, 1944); H. Doc. 361 Message from the President, *Post-War Benefits to Veterans of the Armed Forces*, 78th Cong. 1st Sess. (1943); H. Doc. 344, Message from the President, *Post-War Educational Opportunities for Service Personnel*, 78th Cong. 1st Sess. (1943); *Demobilization and Readjustment*, Report of the Conference on Post-War Readjustment of Civilian and Military Personnel (National Resources Board, 1943).

These principles are especially appropriate here. The importance of the Navy Yards in the war effort requires no elaboration, and it is common knowledge that all available governmental authority and persuasion were invoked to provide and maintain efficient civilian manpower for the critical tasks of shipbuilding and repair. Draft deferment policy was designed to retain personnel in direct order of usefulness for the civilian job to be done in aid of the armed forces afloat or in the field.[10] Those very highly skilled men who in wartime were held in the shipyard rather than inducted into the armed forces, or who, like petitioner, were beyond military age (R. 11), are being re-

[10] At the outset of the war, the Selective Service Administration emphasized its responsibility for occupational classification. A policy statement to local boards read in part: "It is the responsibility of the Selective Service System to allocate the manpower of the Nation among the armed forces, civilian activities necessary to war production, and other civilian activities essential to the support of the war effort . . . Thus the Selective Service System, through the process of classification, must do its part to accomplish an orderly adjustment of the manpower resources of the Nation, so that all available men will properly and expeditiously be directed into that channel of activity where the Nation at war will be best served." *Local Board Memoranda, Selective Service System, 1941-1945* (1945), Release 115, March 16, 1942. Shipfitting was listed as a critical occupation in the essential shipbuilding and repair industry, on the lists compiled by the War Manpower Commission. *Id.*, as amended Aug. 16, 1943. The "necessary man" in a critical occupation was defined as one having the requisite degree of training, qualification or skill, who could not be replaced because of an existing shortage of trained manpower, and whose loss would seriously impair the effectiveness of the war activity engaged in. *Id.* as amended Aug. 16, 1943, Jan. 6, 1944. Government employees were subject to the foregoing standards, plus the requirement that their deferment be requested by the head of the agency involved. *Id.*, Release 115-F; *Selective Service in Wartime* (1943), pp. 219-222, 162-3, 165. A government employee attempting to volunteer for military service was denied release if the appropriate agency committee had requested or would request his deferment under the foregoing standards, unless the employee was likely to be assigned to combat duty, or his skill and ability probably would be utilized equally or more effectively in the armed forces. Executive Order 9309, Part V (Mar. 6, 1943), 50 U. S. C. App. foll. Sec. 305a.

placed under erroneous regulations of the Civil Service Commission which it is submitted Congress never authorized. Such action is harmful to the national defense as well as to the national economy and well-being and the civil service. *Cf.* Sec. 6, 37 Stat. 555, 5 U. S. C. Sec. 652. The regulations issued contravene the legislative intent to give appropriate weight to efficiency, seniority and tenure in relation to military service. *Cf. Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 616-617; *West* v. *Chesapeake and Potomac Telephone Co.*, 295 U. S. 662, 678-680; *St. Louis and O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487.

The public interest will be promoted by settlement in this Court of the important questions involved. It is submitted that subgroups A-1 Plus and A-1 of the Commission's reduction-in-force regulations as here applied are based upon erroneous interpretation of the Commission's authority under the Statute, and are for the reasons stated otherwise invalid. The court below accordingly erred in failing to reverse the judgment of the district court and to direct a remedy appropriate in the circumstances. *Cf. Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 619-623.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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January, 1948

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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

CHARLES FAHY,
PHILIP LEVY,
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Respondents' brief in opposition (pp. 15-18) disputes the necessity of considering the validity of sub-group A-1 Plus, established in the Civil Service Commission's reduction-in-force regulations (*Id.* p. 21). Petitioner's attack on the regulations is directed against both sub-group A-1 and A-1 Plus (Pet. Br. pp. 8-20), rather than chiefly addressed to the latter, as respondents contend. Nevertheless, respondents' argument on sub-group A-1 Plus calls for brief reply in the present posture of the

case in addition to the argument already presented on that issue (Pet. Br. pp. 8-12).

(a) The Solicitor General states that it is not deemed necessary to engage in extended discussion of the validity of the A-1 Plus category; that all employees therein are veterans and in any event are entitled to retention preference as against petitioner and other non-veterans. On the contrary, if sub-group A-1 Plus is held invalid, it cannot be assumed that the regulations in all other respects would be retained by the Commission as now written; and the Court will not take upon itself the discretionary authority vested in the first instance in the Commission. *Jacob Siegel* v. *Federal Trade Commission*, 327 U. S. 608, 613-614; *Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 619-623; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Phelps-Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197.

Apart from this, unless A-1 Plus is valid all employees therein, though veterans, are not entitled to preference over petitioner under the Veterans Preference Act of 1944, even as construed by respondents. Under respondents' own interpretation only those veterans whose efficiency ratings are "good" or better would go into sub-group A-1 and thus take precedence over all non-veterans, regardless of efficiency. Veterans with ratings below "good" would go into sub-group A-3, which has a lower place on the retention register than sub-group A-2, reserved for non-veterans with ratings of "good" or better (Resp. Br. pp. 3, 21-22).

The record shows that 61 veterans in sub-group A-1 Plus lacked the rating of "good" or better needed to place them in sub-group A-1 under present regulations. These 61 veterans are rated "no efficiency" (R. 28-29).

Non-veterans rated "no efficiency" are placed at the bottom of the retention register; that is, they are the first to go in reduction of force (R. 33).

Clearly, therefore, petitioner is aggrieved by the Commission's regulation establishing sub-group A-1 Plus, whereby at least these 61 men were placed above him on the retention register, without authority in law, for the statutory period of one year. As a result petitioner was reached on the register and furloughed in reduction of force while these men were retained (R. 23).

For the first time in this litigation respondents now offer an explanation of their action in this regard (Br. p. 15, footnote 10). They now contend that it was not deemed administratively necessary to give an efficiency rating, prior to the expiration of "their year of absolute preference", to persons classified as "Leadingman Shipfitter", who had demonstrated ability before they had been promoted to that classification. Respondents further contend, "there is nothing to show that they would not all have been given a "good" or better efficiency rating, based on past services, had it been necessary to do so at the time of their re-employment". This explanation is based on misconceptions of fact and of law. Petitioner and the 61 men with "no efficiency" ratings were all classified, not as "Leadingman Shipfitter", but as "shipfitter", and so appeared on the register for that class of employees (R. 26, 28-29, 31).[1] This is not a category of supervisory position and there is no factual basis whatever for assuming that all 61 would have received a rating of "good" or better. On the contrary,

[1] Petitioner had been a "Leadingman Shipfitter" at one time (R. 4), but had been demoted from that position to "Shipfitter" in a reduction of force under present regulations. *Id.* There are no employees with ratings of "no efficiency" on the register for "Leadingman Shipfitter" (R. 21-22).

since the case arises on the affirmance of a judgment granting respondents' motion for summary judgment, any genuine issues of fact material to this and other aspects of the case are to be resolved in favor of petitioner rather than respondents. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 627.

(b) Respondents (Br. p. 16) state that there is no necessity for considering the rationale of the decisions of this Court in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 and *Trailmobile Company* v. *Whirls*, 331 U. S. 40; that those cases dealt with Section 8 of the Selective Service Act, whereas the present case deals with the Veterans Preference Act of 1944. But it is clear that sub-group A-1 Plus is based, not upon the 1944 Act, but on the Commission's mistaken view of the requirements of Section 8 of the Selective Service Act (Pet. Br. pp. 8-9). The *Fishgold* and *Whirls* cases are therefore quite pertinent because their principles, like the Act they construed, apply equally to public and private employment.

(c) Respondents, while reiterating the position maintained since the regulations were established, that sub-group A-1 Plus was required by law, contend that the sub-group is now in force because the Commission "so desires" (Br. p. 18). This self-contradiction results from an attempt to rationalize the position in which the Commission now finds itself. The opinion of the court below upheld the regulations as if they had been an exercise of discretion, and denied that they were required by law; yet the fact is they were made by the Commission because of its belief that they were so required.

Applicable decisions of this Court preclude such attempted justification after the event. The administrative discretion vested in the Commission by Congress,

whatever its scope, has not been and cannot be exercised by a simple *volte face* in course of litigation. Issues involving the security and livelihood of hundreds of thousands of Federal employees, veteran and non-veteran, should not be so resolved, leaving unused the function of administrative determination.

It is submitted that the corrective powers of this Court may not be so casually avoided, and that this Court will confine itself, as the court below should have done, to the validity of the ground on which the Commission believed itself required to rest its action. See *Securities & Exchange Commission* v. *Chenery,* 318 U. S. 80, 88, 94-95; *cf. United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488-489; *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, 184-185. If, as petitioner contends and the court below held, sub-group A-1 Plus is not required by law, the regulations prescribing that category should be set aside, regardless of whether they might be sustained, after remand and reconsideration, as the product of the exercise of permissible discretion, a question which might never be posed. It is submitted that only in this manner can the dead timber of regulations founded on error be removed, the responsible exercise of administrative authority be given vitality, and the orderly functioning of the process of review in an important matter be fulfilled.

Respectfully submitted,

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March, 1948.

FILE COPY

No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 560

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51-52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 53-56) is reported at 165 F. 2d 251.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The petition for a writ of certiorari was filed on January 30, 1948, and was granted on March 8, 1948. The jurisdiction of this Court rests

upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the "superseniority" for one year after return from military service granted veterans of World War II with civil service tenure in Government employment, in preference to all other employees regardless of efficiency or length of service (Sub-group A-1 Plus), is required or authorized by Section 8 of the Selective Training and Service Act of 1940.

2. Whether the civil service regulations for reductions-in-force in Government employment, granting veterans "superseniority" for one year (Sub-group A-1 Plus), and certain preferential standing thereafter regardless of length of service (Sub-group A-1), may be upheld as valid exercises of discretion under Section 12 of the Veterans' Preference Act of 1944 notwithstanding that they were established by the Civil Service Commission in the mistaken belief they were required by law.

3. Whether the civil service regulations for reductions-in-force in Government employment, granting veterans "superseniority" for one year (Sub-group A-1 Plus), and certain preferential standing thereafter regardless of length of service (Sub-group A-1), are required or authorized by Section 12 of the Veterans' Preference Act of 1944.

STATUTES AND REGULATIONS INVOLVED

The Veterans' Preference Act of 1944, 58 Stat. 387 as amended, Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890 as amended, Section 6 of the Act of August 24, 1912, 37 Stat. 555, and the perti-

nent portions of the reduction-in-force regulations, as amended, issued under Section 12 of the Veterans' Preference Act of 1944, are set forth in the Supplement, *infra* pp. 81-95. The regulations are hereinafter cited by § symbol.

STATEMENT

Petitioner was employed in the United States Navy Yard at Charleston, South Carolina, with permanent status in the classified civil service (R. 3). On January 7, 1946, he was demoted from his position of Shipfitter Leadingman at $12.08 per diem, to Shipfitter Maximum at $10.08 per diem (R. 10), and on November 8, 1946 was furloughed without pay for a period of one year in consequence of reductions of personnel in the Navy Yard carried out in accordance with regulations of the United States Civil Service Commission (R. 22). Petitioner had rendered more than twelve years of service as a skilled workman in the shipfitters shop at this Yard, and had an efficiency rating of "Excellent" (R. 4, 10). He was classified over-age for military service (R. 10),[1] he did not serve in the armed forces, and consequently was not entitled to veterans' preference.

The Commission's retention preference regulations for use in reductions-in-force (*infra* pp. 89-95) provide that employees in each grade or "competitive level" in each agency or installation shall first be divided into three "retention groups" based upon the nature of their tenure of employment, as follows:

> Group A, employees who have met all requirements for indefinite retention in present positions;

[1] Petitioner's correct draft classification was IV-A, not IV-E as the record inadvertently shows (R. 10).

Group B, employees serving under appointments with a time limitation exceeding one year;

Group C, employees serving under temporary appointments with time limitations of one year or less. § 20.3.

Each such group is then divided into sub-groups according to veterans' preference and—except for sub-group A-1 Plus—efficiency rating. Group A is accordingly subdivided as follows:

"A-1 Plus during one-year period after return to duty, as required by law.

A-1 With veteran preference unless efficiency rating is less than 'Good'.

A-2 Without veteran preference unless efficiency rating is less than 'Good'.

A-3 With veteran preference where efficiency rating is less than 'Good'.

A-4 Without veteran preference where efficiency rating is less than 'Good'." *Id.*

Groups B and C are likewise broken down in four similarly numbered subdivisions, omitting the "1 Plus" category in each instance. *Id.* Within each of these sub-groups employees are assigned retention credits by allowing one point for each full year of Government service (including military service), five points for an "excellent" efficiency rating, three points for a "very good" efficiency rating, and one point for a "good" efficiency rating. § 20.2(c).[2] Employees are listed in their respective sub-groups in order of their total number of retention points. § 20.7. Reductions-in-force are made by starting with the lowest sub-group, that is, Sub-

[2] The point scores given efficiency ratings under the regulations at various times are set forth *infra*, p. 35, note 11.

group C-4, and eliminating employees in inverse order of the number of their retention credits. All employees in a lower sub-group must be eliminated before those in the next higher sub-group are reached. § 20.8.

Petitioner was placed in Group A, Sub-group A-2 on the retention registers (R. 21, 30). At the time of petitioner's furlough the regulations gave higher retention priority on the shipfitter register to 57 employees in Sub-group A-1 (R. 28-29) and 118 employees in Sub-group A-1 Plus (R. 25-28). Of those in Sub-group A-1 Plus, 2 were listed with efficiency ratings of "excellent" (R. 25), 55 were rated "good" (R. 25-27), and 61 were listed "no efficiency" (R. 27-28). Non-veterans with ratings of "no efficiency" were placed below Sub-group A-2 on the register, and therefore furloughed before petitioner was reached (R. 32).

Petitioner brought this action in the United States District Court for the District of Columbia, for a declaratory judgment that the regulations as applied to him were beyond the scope of respondents' authority, and for other relief (R. 2). After answer (R. 6), both petitioner and respondents moved for summary judgment on the ground that no genuine issue as to any material fact was presented and that judgment be given as a matter of law (R. 9, 51). The District Court denied the motion by the petitioner, and granted summary judgment for the respondents (R. 52), based on a memorandum opinion that the regulations complained of were consistent with the purpose, letter and spirit of the Veterans' Preference Act of 1944 (R. 51-52). Final order was entered May 9, 1947 (R. 52). On appeal the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 57). Its opinion declared that the Commission's regu-

lations were not "the only possible method" of applying the Act as the Commission had contended (R. 55); that the statute "did not mean to foreclose the Commission by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced Federal force in preference to experienced non-veteran personnel" (R. 56). The court stopped short, however, of holding the regulations void, declaring it could not say that they were "an unreasonable method" of applying the statute (R. 55).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that Sub-groups A-1 Plus and A-1 of the regulations for reduction-in-force of Federal Government employees as here applied were within the discretion of the Civil Service Commission, and in affirming the judgment of the District Court upon that ground, notwithstanding that respondents established those sub-groups in the mistaken belief they were required by law.

2. In failing to hold that Sub-groups A-1 Plus and A-1 of the reduction-in-force regulations as here applied were not required by either the Selective Training and Service Act of 1940 or the Veterans' Preference Act of 1944, and in failing to invalidate those sub-groups on the ground they had been established by the Civil Service Commission in the mistaken belief they were respectively required by those laws.

3. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group

A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans were retained in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of efficiency ratings or seniority.

4. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby veterans with ratings of "no efficiency" were retained as shipfitters in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of their higher efficiency ratings and greater seniority.

5. In holding that Section 12 of the Veterans' Preference Act of 1944 required or authorized Sub-group A-1 of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans with efficiency ratings of "good" or better were retained in the Charleston Navy Yard in preference to petitioner and other shipfitters in that Navy Yard who are non-veterans but had higher efficiency ratings and greater seniority.

6. In affirming the judgment of the District Court denying petitioner's and granting respondents' motion for summary judgment.

7. In failing to reverse the judgment of the District Court, with direction for appropriate relief based on the invalidity of the regulations as here applied.

SUMMARY OF ARGUMENT

I. Sub-group A-1 Plus of the Commission's regulations, granting "superseniority" to veterans of World War II for one year regardless of efficiency or length of service, is invalid. The Commission established this sub-group in the belief that it was "required by law", namely by Section 8 of the Selective Training and Service Act of 1940. This Court has rejected the contention that the Act of 1940 granted such "superseniority" to veterans in either public or private employment where, as here, a *bona fide* reduction-in-force becomes necessary at some time during the first year of return from military service. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-291; *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 56-57. The attempted distinction between this and the *Fishgold* case, based on the length of furlough, is contrary to the meaning of the terms "discharge" and "furlough" in the Act of 1940 and in the very record and regulations here involved. Since the Commission erred in promulgating Sub-group A-1 Plus under a mistaken interpretation of law, the administrative action should be set aside. The grounds upon which the Commission acted in exercising its powers were not those upon which its action can be sustained. *Securities Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95, 332 U. S. 194, 196-197.

In any event Sub-group A-1 Plus is neither required nor authorized by Section 12 of the Veterans' Preference Act of 1944. The sub-group completely ignores the requirements of that section that "due effect" be given length of service and efficiency. The Commission particularly erred in placing in Sub-group A-1 Plus 61 veterans with ratings of "no efficiency". With the sub-group held invalid under Section 12, we can-

not assume that the regulations in all other respects would be retained as written, for this Court will not take on itself discretionary authority vested in the first instance in the Commission. Moreover, even under respondents' regulations, Sub-group A-1, the 61 veterans with "no efficiency" lacked the rating of "good" or better needed to displace non-veterans like petitioner with "excellent" ratings. On this petition to review the granting of summary judgment below, there is no factual basis for assuming that all these veterans with "no efficiency" rating would eventually have received a rating of "good" or better, or that any of them had attained such rating before induction.

II. Sub-group A-1, granting absolute preference to veterans with ratings of "good" or better over all non-veterans with equivalent tenure of employment but regardless of length of service, is invalid. This sub-group was established by the Commission in the belief it was required by Section 12 of the Veterans' Preference Act of 1944. Respondents cannot now forestall the corrective powers of this Court by verbally shifting the basis of the regulation from compulsion to discretion. Here, as in Sub-group A-1 Plus, the judgment below should be reversed if the agency has misconceived the law rather than exercised its discretion in an area entrusted to it by Congress.

Analysis of the Act, its objectives and legislative history, demonstrates that Sub-group A-1 is neither required nor authorized by Section 12. The Act is part of a comprehensive post-war program developed by the Federal Government for the reemployment and rehabilitation of veterans of World War II, all designed to reestablish them as citizens in a healthy national economy. The meaning of Section 12 and the validity of

Sub-group A-1 thereunder must be ascertained in the light of that objective. Section 12 requires that regulations for reduction in force "shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings". "Military preference" is the only one of the four factors which is not self-defining. Its meaning is not fixed, but varies throughout the statute depending upon the particular employment problem. The content of the preference under Section 12 has the weight given in the first two provisos thereof, and nothing more. The first proviso requires that time spent in the armed forces be counted toward length of total service. The second proviso, which deals solely with the factor of efficiency, requires that the veteran with an efficiency rating of "good" or better shall be preferred over "all other competing employees", and if his efficiency rating is below "good" he shall be preferred over "competing non-preference employees" with the same or lower efficiency ratings. The factors of efficiency and length of service are thus augmented by the veteran's preference, but the veteran's retention standing as augmented must nevertheless be compared with that of non-veterans in the final determination on reductions in force. Whatever method or order of grouping is adopted, the veteran with a rating of "good" is preferred over the non-veteran having the same tenure and aggregate length of service, in keeping with the second proviso. The Commission retains discretion, of course, to determine what periods of service shall be considered of equal weight in such grouping. In this way, we "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions per-

mits". *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285. The veteran is thus given special consideration in reestablishing himself in Government service, but without committing the error of setting him above and apart from the national interest by a form of "super-seniority."

The fundamental error in the Commission's regulations is the failure to give due effect to length of service in the basic ranking or grouping of veterans *vis-a-vis* non-veterans, with the result that Sub-group A-1 erroneously gives absolute preference to veterans in reductions-in-force. In establishing Group A and Sub-group A-1 thereof, the Commission gives no weight whatever to length of service. It relegates that factor to a third-rate item used merely to distinguish between employees already grouped without regard to seniority. Where Congress intended such absolute veteran's preference under the Act, it used plain words manifesting that intention; for example, on entrance into Government employment by certain "preference eligibles" under Sections 3 and 7. There is no such legislative direction that absolute preference be given "preference employees" under Section 12, and the third proviso plainly negatives such a construction. The Commission recognizes by its regulations that the preference granted the veteran under the second proviso does not require it to disregard tenure of employment. By the same token, the Commission may not construe that proviso to disregard length of service in the original grouping, unless that conclusion is assumed in advance by an unwarranted construction of the phrase "all other competing employees". The process of interpretation misses its high function if a strict reading of the law "results in the emasculation or deletion of a provision which a less

literal reading would preserve". *Markham* v. *Cabell*, 326 U. S. 404, 409.

Sub-group A-1 is therefore neither required by the statute nor justified by any reasonable test of statutory discretion. This conclusion is supported by the immediate legislative background of the statute, the legislation and administrative practices preceding enactment, and the status of the measure in Congress subsequent to enactment. The Veterans' Preference Act was the outcome of eight years of Congressional consideration. The version introduced as late as 1943 by the House sponsor gave sole weight to length of service (including years of military service) in reductions-in-force. This was amended to conform to the present language, on the Commission's representation that consideration should also be given to the relative efficiency of the employees. The legislative history confirms that length of service was nevertheless to be given due effect, subject to the further proviso that years in military service shall be counted toward seniority in civil service.

Unquestionably one purpose of the Act of 1944 was to codify all the preference rights and privileges of veterans in Federal service. But the legislative history shows overwhelmingly that Congress made significant changes from the pre-existing practices and statutes relied upon by respondents in the construction of Section 12. Section 18 specifically provides that "all Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith." The purpose of the further saving clause in that Section is to protect the preference of peace-time veterans who were in Government employment and on civil service registers when the Act was passed, and who otherwise would be excluded by its terms. *Mitchell* v. *Cohen*, Nos. 130-

131, this Term. The changes from previous laws made by the Act of 1944 are nowhere more pronounced than in reference to Section 4 of the Act of August 23, 1912, which is cited by the Government as the earlier prototype of the second proviso of Section 12. In other litigation in the Federal courts, the Government is insisting that the Act of 1944 superseded the Act of 1912 and differs from it in many material respects. There are obvious differences in the language and context of the two statutes which reflect clear differences in their objectives and meaning. *Cf. Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 488-489.

Proceedings in Congress since the enactment of the Veterans' Preference Act show, if anything, that Congress does not concur in a construction or amendment of the Act giving absolute preference to veterans in disregard of the efficiency and seniority standing of career non-veteran employees. The historical background of the Act as a whole thus verifies petitioner's analysis that length of service is one of the important factors to be weighed in the basic grouping of employees for retention, and that the Commission's failure to accord such weight to length of service brings Sub-group A-1 into conflict with the statute.

Sub-group A-1 leads to unjust and unreasonable results that should be avoided in ascertaining the Congressional purpose. Approximately 85% of the veterans accorded absolute preference in the Charleston Navy Yard were without prior experience in shipbuilding and were trained by the career civil service employees whom they have displaced under the regulations. To a large extent, the efficiency of the naval shipyards and their capacity to meet the demands of World War II depended upon the well-developed skills of

these career employees. Many years will be required to bring the yards up to the previous level of ingenuity and skill.

American experience during World War II showed that manpower shortages were our greatest single problem in war procurement. Draft deferment policies were designed to retain personnel in the shipyards and other vital war production centers in direct order of usefulness for the civilian job to be done in aid of the armed forces afloat or in the field. Yet under the Commission's regulations, veterans with only a few weeks or months of Government service prior to induction are displacing the most seasoned and efficient career civil service employees. This action is harmful to the national defense and the civil service. It is contrary to the objectives of the statute and the veterans' reemployment and rehabilitation program of which it is an integral part.

In sum, Sub-group A-1 is based on a misapprehension of the meaning of "military preference" in Section 12, and contravenes the statutory plan to give appropriate weight to efficiency, seniority and tenure in relation to military service.

III. Petitioner should be granted such further relief on remand as this Court may deem just and proper, or which is not inconsistent with the opinion of this Court. Such relief requires "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially". *Addison* v. *Holly Hill Fruit Products Inc.*, 322 U. S. 607, 620-623.

ARGUMENT

I

SUB-GROUP A-1 PLUS IS INVALID

A. *Sub-group A-1 Plus Was Established by the Commission in the Belief It Was Required by the Selective Training and Service Act of 1940.*

Sub-group A-1 Plus of the Commission's reduction-in-force regulations grants the maximum priority, or "super-seniority", to World War II veterans, in preference to other veterans as well as to all non-veterans, "during one-year period after return to duty, as required by law". Notwithstanding the regulation itself states that the sub-group is "required by law", respondents argue that the issue thereunder is one of discretion involving "primarily" the Veterans' Preference Act of 1944 (Br. Opp. p. 16). It seems plain enough that the Commission established Sub-group A-1 Plus in the belief that it was "required by law"; and that the law referred to is Section 8 of the Selective Training and Service Act of 1940, as amended and supplemented, rather than the Veterans' Preference Act of 1944.

Thus the regulations contain no Sub-groups B-1 Plus or C-1 Plus, since the war service employees embraced by those sub-groups are deemed holders of "temporary positions" at time of induction and hence are expressly denied statutory restoration to their former positions under the language of Section 8 of the Selective Training and Service Act of 1940, *infra* p. 88, regardless of its scope as applied to veterans with permanent tenure. See 40 Op. Atty. Gen. No. 66, May 23, 1943.

This conclusion, evident on the face of the regulations, is confirmed by other pronouncements of the Commission in this regard. The Federal Personnel

Manual, publication of which began in 1945 as the Commission's "official medium" for issuing regulations (c. A3-1), in a chapter entitled "Restoration or Reemployment after Military Service" described the "legal basis" of such restoration as follows:

> "Restoration, statutory.—Reemployment in accordance with rights and benefits granted by the Selective Training and Service Act of 1940, as amended, the act of August 27, 1940, the Service Extension Act of 1941, or the Public Health Service Act of July 1, 1944. Such rights and benefits are limited to persons who leave other than 'temporary' positions . . .
>
> "Restoration, regulatory.—Reemployment in accordance with rights and benefits granted by section 10.109 of the Commission's regulations, section 2 of the War Service regulation XIII or section 2 of Temporary Civil Service regulation XVII, but not by statute. These restoration rights apply to persons appointed under the civil service rules or war service regulations whose appointments are not limited to one year or less but are 'temporary' within the meaning of the statutes referred to in the preceding paragraph. War-service indefinite appointees fall within this category". (Chapter R6-2)

See also *62nd Annual Report of the United States Civil Service Commission* (for the fiscal year ending June 30, 1945) p. 20.

The Commission consistently maintained this position when, in 1946, following the decision of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, it asked the Attorney General for an opinion as to the validity of sub-group A-1 Plus in reductions-in-force. *Departmental Circular No. 556*, June 18, 1946. The specific question propounded was as follows:

"Is the Federal Government obligated to reemploy a returning World War II veteran under section 8 of the Selective Training and Service Act, even though such reemployment would require the release of another veteran preference employee having greater length of service?"

The Opinion of the Attorney General states:

"... the instant question involves a determination of the validity of the regulations of the Civil Service Commission establishing the 'A-1 plus' category in reductions in force [5 C. F. R. (1945 Supp.) sec. 12.301]. *The Commission informs me that at the time the A-1 Plus category was established, that action was regarded as required by the provisions of section 8.* The Commission refers particularly to the provision of section 8 which prohibits the discharge of a reemployed veteran without cause for one year after his reemployment". 40 Op. Atty. Gen. No. 115 (Sept. 20, 1946) p. 4. (Italics supplied)

The Attorney General answered in the affirmative the question propounded, holding that Sub-group A-1 Plus was "valid and designed to effectuate the provisions of Section 8" of the Selective Training and Service Act. *Id.*, p. 5. The Commission thereupon advised all agencies and departments that the regulation would stand unchanged.[3]

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[3] "1. The attention of all departments and agencies is invited to the opinion of the Attorney General dated September 20, 1946, relative to the effect of the decision of the Supreme Court in the case of *Fishgold* v. *Sullivan Drydock & Repair Corporation, et al.*, on the Commission's retention-preference regulations.

"2. The Attorney General is of the opinion that 'the regulations of the Civil Service Commission establishing the A-1 plus retention preference are, • • • valid and designed to effectuate the

The Commission thus predicated and the Attorney General sanctioned sub-group A-1 Plus upon their construction of the requirements of the Selective Training and Service Act of 1940, as amended and supplemented, rather than upon any supposed discretionary authority stemming from the Veterans' Preference Act of 1944,[4] as the Government now appears to argue.

B. *Sub-group A-1 Plus Is Not Required by the Selective Training and Service Act of 1940.*

Applicable decisions of this Court have rejected the contention that Section 8 of the Selective Training and Service Act of 1940 grants the veteran any extraordinary retention priority or "super-seniority" when a *bona fide* reduction in force becomes necessary at some time during the first year following his return to

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provisions of section 8 (of the Selective Training and Service Act of 1940).

"3. In view of this opinion, the Commission does not propose to make any change in the retention-preference regulations as a result of the decision of the Supreme Court." *Departmental Circular No. 55o, Supplement No. 2,* November 1, 1946.

[4] The Attorney General's Opinion referred to also contends that the saving clause of Section 18 of the Veterans' Preference Act of 1944, namely that nothing therein "shall be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law", etc., indicates a Congressional "desire" for preservation of the veteran's "right" of restoration to his position (p. 8). Of course the Act of 1944 cannot save or preserve a "right" which, as will be demonstrated *infra,* pp. 19-29, the veteran actually did not enjoy. *Mitchell* v. *Cohen,* decided March 8, 1948, No. 130-131, this Term. Moreover the saving clause of Section 18 is designed simply to preserve the pre-existing rights of "peacetime" soldiers who are not covered by the Act of 1944. *Id.;* see *infra,* pp. 61-62.

duty after honorable discharge from military service. While that Act is to be liberally construed for the veteran's benefit, it did not intend to grant a step-up or gain in priority over what the veteran would have had if he had never entered the armed forces. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285-289. As Judge Learned Hand pointed out in the opinion of the Circuit Court of Appeals in that case, Congress never sanctioned the regulation of the Director of Selective Service which in effect gave "industrial priority, regardless of their length of employment, to unmarried men—in the most part under 30—over men in the 30's, 40's or 50's who had wives and children dependent upon them". 154 F. 2d 785, 789 (C. C. A. 2d).

In the subsequent opinion in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, the contention for "'superseniority" within the statutory period was deemed on a par with that for statutory protection beyond one year. The Court did not believe that "Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit". 331 U. S. at 57.

The principles of these cases, like Section 8 of the Act they construed, are thus equally applicable whether the employment is public or private. *Id.* The Executive's power of removal from Federal office or employment, though broad, may be limited by statute in proper cases. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *United States* v. *Perkins*, 116 U. S. 483, 485; *United States* v. *Wickersham*, 201 U. S. 390. The principle is established by statute that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will pro-

mote the efficiency of said service". Act of August 24, 1912, Sec. 6, 37 Stat. 555. This provision has just been reiterated by Congress, limited only by the necessities of national security. S. 1486, 80th Cong. 2d Sess., sent to conference, March 16, 1948. 94 Cong. Rec. 3013-3014 (daily ed.); see H. Rep. No. 1436, 80th Cong., 2d Sess., pp. 3-6. Insofar as this principle is modified in making reductions-in-force, under the Selective Training and Service Act of 1940 or the Veterans' Preference Act of 1944, the appointing power in the executive branch of the Government must remain within the procedures and limitations there prescribed, as respondents appear to concede (Br. Opp. p. 7, note 2). For purposes of the instant case, petitioner's superior retention rights by operation of such laws have the same effect as the non-veterans' superior seniority rights under private contracts in the *Fishgold* and *Trailmobile* cases. See *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 53, note 21.

It is submitted that the *Fishgold* case affords no basis for respondents' argument below that the principle established should be limited to very brief layoffs comparable to the 1 to 9 day periods there involved; or in any event should be limited to furloughs not exceeding 30 days, which is the minimum for operation of the Commission's reduction-in-force regulations. §20.2(a). Respondents' position finds no support in the decisions under the Selective Training and Service Act since the *Fishgold* case, either by this Court in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, or by the lower Federal courts. See e.g., *Mikczynski* v. *North American Aviation, Inc.*, decided April 22, 1947 (S. D. Cal.) 12 Labor Cases C. C. H. ¶ 63,814; *Maloney* v. *Chicago B&Q R. R.*, 72 F. Supp. 124, 126 (W. D. Mo.);

Giblin v. *Curtiss-Wright Corp.*, decided February 6, 1947 (D. N. J.), 12 Labor Cases C. C. H. ¶ 63,792.

The Opinion of the Attorney General already referred to (*supra*, p. 17), assumes that "underlying the reduction in force regulations is a determination by the Civil Service Commission that 'separation' or 'furlough for over thirty days' are actions constituting a 'discharge' ". 40 Op. Atty. Gen. No. 115, p. 7. Even under this assumption, there is nothing of record to show that when petitioner was improperly furloughed in place of a veteran in Sub-group A-1 Plus, the latter had more than 30 days remaining in his statutory year. In any case, the Attorney General's assumption is contrary to the clear distinction recognized by this Court in the *Fishgold* case, between being placed on "furlough status" for one year and being "discharged" or separated in a reduction-in-force.[5] And in *Trailmobile* v. *Whirls*, this Court reiterated that the job guaranty for the statutory period did not apply to a veteran who "simply had been deprived of the opportunity to work by operation of the seniority system, when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his

[5] "Discharge normally means termination of the employment relationship or loss of a position. In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been 'discharged'. • • • A furlough is not considered a discharge. It is a form of lay-off. • • • If [Congress] had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration, when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation". 328 U.S. 275, 286-287.

full standing under the Act". 331 U. S. at 56. This construction embraces any type of furlough in reductions-in-force, whether very brief or more extended, and eliminates any possible contention that a veteran who is furloughed for more than 30 days due to reduction-in-force has been "discharged from such position without cause" within the meaning of Section 8(c) of the Selective Training and Service Act of 1940.

The regulations as applied herein show conclusively that a furlough up to one year is not regarded as a discharge or separation. The notice of the Navy Department to petitioner states that "in view of the expressed policy of the Navy Department to retain its long-time high-grade career employees and in the hope that within one year conditions may justify your recall to duty, it is proposed to place you in a furlough status rather than effect your absolute separation by reduction in force . . . If you are in sub-group A-1 or A-2 you will be carried in a furlough status for a period of one year from the effective date of your furlough, unless sooner recalled to duty. At the end of the one year period you will be separated for reduction in force" (R. 22, 23-24)[6] "In the event you desire to be separated rather than furloughed, you should so advise the Industrial Relations Officer in writing" (R. 22-23). The Navy Department called attention to the fact that men placed on furlough are unable to secure a refund of their retirement deductions "until such time as your furlough is terminated by an absolute separation" (R. 23). This one-year notice was given pursuant to the retention

[6] In contrast, petitioners in *Mitchell* v. *Cohen* and *Hubickey* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term, were "separated" in reductions-in-force by the War and Navy Departments, respectively. *Id.*, Record on Writ of Certiorari, pp. 2, 55.

preference regulations of the Commission then in force, providing that employees may be furloughed for a period not exceeding one year instead of being separated outright when the reduction-in-force is the result of a temporary condition not expected to continue for more than one year. 5 C. F. R. (1945 Supp.) § 12.309(a). In event of vacancies, such furloughed employees "shall be given opportunity to return to duty before any original appointments are made to such positions". *Id.*[7]

The attempted distinction between this and the *Fishgold* case, based on the length of furlough, is thus seen to be contrary to the meaning of the term "discharge" in Section 8 of the Selective Training and Service Act of 1940 and in the very record and regulations here involved.

C. *Since the Commission Erred in Promulgating Sub-group A-1 Plus Under a Mistaken Interpretation of Law, that Sub-group Should Be Set Aside.*

While reiterating the position maintained since the regulations were established, that Sub-group A-1 Plus was required by law, respondents now contend that the sub-group is presently in force because the Commission "'so desires" under Section 12 of the Veterans' Preference Act of 1944 (Br. Opp. p. 18). This self-contradiction obviously results from an insupportable attempt to bring the regulations, without Commission reconsideration of them, from the area of compulsion into the area of discretion. Discretion cannot be exercised by such a verbal maneuver. The effort arises

[7] The one-year notice rule is now mandatory for employees in sub-groups A-1 and A-2 with competitive status. 12 F. R. 59 (January 4, 1947); Regulations, §§ 20.9(a), 20.10, *infra*, pp. 94-95.

from the opinion of the court below. That opinion upheld the regulations as a reasonable exercise of discretion, but denied that they were required by law (R. 56); yet the fact remains they were issued by the Commission in the belief that they were so required. *Supra*, pp. 15-18.

Sub-group A-1 Plus is also beyond the Commission's discretionary authority. *Infra*, pp. 26-29. But the point here is that the attempt to support it as the product of discretion when clearly it is not, is contrary to principles of administrative law laid down by this Court. The administrative agency here, as in *Securities Exchange Commission* v. *Chenery*, 318 U.S. 80, erred in basing its action on supposed compulsion of law. In that case this Court declined to consider the further argument pressed on appeal that the Commission's action was valid as an exercise of discretion, saying:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the adminis-

trative agency acted be clearly disclosed and adequately sustained. . . . In finding that the Commission's order cannot be sustained we are not imposing any trammels on its powers. . . . We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained". 318 U.S. at 94-95.

See also *Securities Exchange Commission* v. *Chenery*, 332 U.S. 194, 196-197; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489.

The foregoing principle is laid down with respect to quasi-judicial bodies whose findings of fact are conclusive if supported by substantial evidence and whose interpretations of law are entitled to great weight. The same principle applies with even greater force in the instant case, where the regulations of the Civil Service Commission, like those of the Selective Service Administrator, may be resorted to for guidance but "are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions". See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290. The administrative discretion vested in the Commission by Congress, whatever its scope, has not been and cannot be exercised by a simple *volte face* in course of litigation which in fact never calls into use the minds of the persons in whom the discretion is vested. If we are correct in our contention that the Commission issued the regulation setting up A-1 Plus under the belief it was compelled by the 1940 Act so to do, and that that belief was ill-founded, then the Sub-group falls. The foundation upon which it rests is withdrawn. It is left without any support.

It is submitted that the court below erred in not facing and deciding this issue regarding Sub-group A-1 Plus, separate from the issues of discretion regarding the other sub-groups, if indeed discretion was exercised in their formulation. Issues involving the security and livelihood of hundreds of thousands of Federal employees, veteran and non-veteran, should not be resolved by leaving unused the function of administrative determination to be exercised when the foundation upon which a regulation purports to rest is wholly lacking. It is indeed a rash assumption as well that the Commission would ever re-promulgate Sub-group A-1 Plus if it knew it was not required to do so. Since the Sub-group was promulgated only in the belief it was required by law, it must be assumed it will not be re-promulgated if the basis for its initial formulation, Section 8 of the 1940 Act, is found not to support it.

D. *Sub-group A-1 Plus is Beyond the Scope of the Commission's Authority Under Section 12 of the Veterans' Preference Act of 1944.*

Assuming, contrary to our contention, that respondents may properly urge here the validity of sub-group A-1 Plus under Section 12 of the Veterans' Preference Act, that sub-group is beyond the scope of the Commission's authority thereunder.

In establishing Sub-group A-1 Plus, the Commission ignored completely the requirement of Section 12 of the Act of 1944 that "due effect" be given length of service and efficiency, along with tenure and military preference. And whatever may be the scope of the second proviso to Section 12 (*infra*, pp. 38-49), it is assuredly based on elements of comparative efficiency

which are wholly ignored by the Commission in placing all returned veterans in Sub-group A-1 Plus for one year. Veterans in Sub-group A-1 Plus were given retention rights superior to all other shipfitters in the Charleston Navy Yard, whether veterans in Sub-group A-1 or non-veterans in Sub-group A-2, regardless of the "excellent" or "good" efficiency ratings of all the employees in the latter sub-groups, and the higher seniority of many of them, including petitioner (R. 27-31).

Apart from the validity of Sub-group A-1 Plus as a whole, there was no statutory authority for placing in that category 61 employees with ratings of "no efficiency" (R. 27-28). Non-veterans with ratings of "no efficiency" were placed below Sub-group A-2 on the retention register (R. 32), and hence were furloughed before petitioner and others in his sub-group were reached. And on respondents' own construction, Section 12 at best gives absolute preference in retention to veterans with efficiency ratings of "good" or better, and also at best gives veterans with efficiency ratings below "good," absolute preference over all non-veterans with equal or lower ratings. These 61 veterans in sub-group A-1 Plus lacked the rating of "good" or better needed to place them in Sub-group A-1 under present regulations. If category A-1 Plus were eliminated, veterans with ratings below "good" would go into Sub-group A-3, which has a lower place on the retention register than Sub-group A-2, reserved for non-veterans with ratings of "good" or better.

Respondents take the position that all employees in Sub-group A-1 Plus are veterans and in any event are entitled to retention preference under Sub-group A-1 as against petitioner and other non-veterans, regardless of the validity of Sub-group A-1 Plus (Br. Opp. p. 16).

The issue cannot be avoided in this manner. If Sub-group A-1 Plus is held invalid, it cannot be assumed that the regulations in all other respects would be retained by the Commission as now written; and this Court will not take upon itself the discretionary authority vested in the first instance in the Commission. See *Siegel* v. *Federal Trade Commission*, 327 U.S. 608, 613-614; *Addison* v. *Holly Hill Fruit Products Co., Inc.*, 322 U.S. 607, 619-623; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94-95; *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. Moreover, unless Sub-group A-1 Plus is valid all employees therein, though veterans, are not entitled to preference over petitioner under the Veterans' Preference Act of 1944, even as construed by respondents. As we have already shown (*supra*, pp. 26-27), petitioner is clearly aggrieved by the Commission's regulations establishing Sub-group A-1 Plus, whereby at least 61 veterans with ratings of "no efficiency" were placed above him on the retention register, without authority in law, for the statutory period of one year. As a result petitioner was reached on the register and furloughed in reduction-in-force before these men were reached (R. 22).

Respondents argue that it was not deemed "administratively necessary" to give an efficiency rating, prior to the expiration of "their year of absolute preference", to persons classified as "Leadingman Shipfitter", who had demonstrated ability before they had been promoted to that classification. And respondents further contend, "there is nothing to show that they would not all have been given a good or better efficiency rating, based on past services, had it been necessary to do so at the time of their re-employment" (Br. Opp.

p. 15, note 10). This argument is without substance. Petitioner and the 61 men with "no efficiency" ratings were all classified, not as "Leadingman Shipfitter", but as "Shipfitter", and so appeared on the register for that class of employees (R. 25, 27-28, 30).[8] This is not a category of supervisory position; and there is no factual basis whatever for assuming that all 61 would have received a rating of "good" or better, or even that any of them had such ratings before induction into the armed forces. Since the case arises on the affirmance of a judgment granting respondents' motion for summary judgment, any genuine issue of fact material to this and other aspects of the case should be resolved in favor of petitioner rather than respondents. *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 623-624, 627; *Arenas* v. *United States*, 322 U.S. 419, 431-433; *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265, 266 (App. D. C.); *Weisser* v. *Mursam Shoe Corp.*, 127 F. 2d 344, 346 (C.C.A. 2d).

We submit that Sub-group A-1 Plus as here applied finds no support in Section 12 of the Veterans' Preference Act of 1944 or in any discretionary authority flowing therefrom. And lacking the authority under which it was issued, namely, Section 8 of the Selective Training and Service Act of 1940, it should now be set aside.

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[8] Petitioner had been a "Leadingman Shipfitter" at one time (R. 3), but had been demoted from that position to "Shipfitter" in a reduction-in-force under present regulations. *Id.* There are no employees with ratings of "no efficiency" on the register for "Leadingman Shipfitter", and none in Sub-group A-1 Plus on that register (R. 20-21).

II

SUB-GROUP A-1 IS INVALID

A. *Sub-group A-1 Was Established by the Commission in the Belief It Was Required by Section 12 of the Veterans' Preference Act of 1944.*

It will be helpful at the outset to clarify the issue regarding Sub-group A-1. Respondents argued below that Congress "did not see fit to allow the Commission any administrative latitude in this matter"; that the statute required the Commission to establish Sub-group A-1 in the regulations governing reductions-in-force. The court below expressly controverted this view of the Commission that "the regulations as drawn represent the only possible method of applying the statute" (R. 56). Congress did not mean to foreclose the Commission, the court said, "by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel" (R. 56). Nevertheless the court sustained Sub-group A-1 along with the other regulations because "we cannot say that this was an unreasonable method" of applying the statute (R. 55). Respondents now reiterate that the statute "required the Commission to act as it did,. . . . we shall urge that point should certiorari be granted" (Br. Opp. p. 17). They now add, however, that the regulations are presently in force "because the Commission so desires and constitute a voluntary expression of the Commission's views". *Id.*, p. 18.

We believe it is demonstrable that Sub-group A-1 is neither required by Section 12 of the Act nor within the scope of the Commission's discretionary authority

thereunder. It is submitted first, however, that here, as with respect to Sub-group A-1 Plus, if the agency has misconceived the law rather than exercised its discretion in an area which Congress has entrusted to it, the judgment below should be reversed without more. The Commission cannot forestall the corrective powers of this Court by verbally changing at this stage of the litigation the basis of its original action. *Supra*, pp. 23-26.

We turn now to a comprehensive examination of the Act and its legislative history, from the standpoint both of statutory requirement and administrative discretion.

B. *Sub-group A-1 Is Neither Required Nor Authorized by Section 12 of the Veterans' Preference Act of 1944.*

1. ANALYSIS OF THE ACT.

Objectives. The purpose of the Veterans' Preference Act of 1944 was recently stated by this Court in *Mitchell v. Cohen*, decided March 8, 1948, No. 130-131, this Term, as follows:

> "The Veterans' Preference Act was enacted in 1944 to aid in the readjustment and rehabilitation of World War II veterans. It was felt that the problems of these returning veterans were particularly acute and merited special consideration. Their normal employment and mode of life had been seriously disrupted by their service in the armed forces and it was thought that they could not be expected to resume their regular activities without reemployment and rehabilitation aids. The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preference and protection for returning veterans at every stage of federal employment."

The Act is one aspect of a comprehensive post-war program developed by the Federal Government for the millions of World War II veterans, including aids toward employment and unemployment insurance, formal education, technical training, and ownership of homes, farms and independent small business.[9] All are embraced in a broad-gauged plan framed so far as humanly possible to re-establish the veterans as citizens in a healthy national economy. As stated by the President in a message to the Congress on "Post-War Benefits to Veterans of the Armed Forces":

> "The returning soldier and sailor and marine are a part of the problem of demobilizing the rest of the millions of Americans who have been working and living in a war economy since 1941 . . . But the members of the armed forces have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems". H. Doc. No. 361, 78th Cong. 1st Sess., p. 1.

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[9] See 58 Stat. 284, 38 U.S.C. § 693; Statement by the President on signing S. 1767, the Servicemen's Readjustment Act (June 22, 1944), in U. S. Code Congressional Service, 78th Cong., 2d Sess., p. 1400; H. Doc. 361, Message from the President, *Post-War Benefits to Veterans of the Armed Forces*, 78th Cong., 1st Sess. (1943); H. Doc. 344, Message from the President, *Post-War Educational Opportunities for Service Personnel*, 78th Cong., 1st Sess. (1943); *Demobilization and Readjustment*, Report of the Conference on Post-War Readjustment of Civilian and Military Personnel (National Resources Board, 1943).

One-sixth of the Federal budget is currently devoted to veterans' services and benefits. H. Doc. No. 456, 80th Cong., 2d Sess., p. M11. There are approximately 18,600,000 veterans in the United States, including 14,700,000 veterans of World War II. Within a decade, veterans and their immediate dependents will constitute more than two-fifths of our entire population. *Id.*, p. M21.

The answer to the problem of statutory construction must be sought "by examination of the statutory scheme rather than by reliance upon dictionary definitions". *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. "Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words". *United States* v. *Dotterweich*, 320 U.S. 277, 280. No matter how "clear the words may appear on 'superficial examination'", *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 544, "resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes". *Markham* v. *Cabell*, 326 U.S. 404, 409. See also *Chicago & Southern Air Lines Inc.* v. *Waterman S. S. Co.*, decided Feb. 9, 1948, Nos. 78, 88, this Term.

The statutory plan is best summarized in a letter by the President to the Chairman of the House Committee on Civil Service dated February 26, 1944, indorsing the measure:

> "I believe that legislation relating to preference for veterans in positions in the Federal civil service should include, among others, the following points:
>
> "1. Authority should be granted, during the war and for a period of 5 years following the war, to restrict to veterans examinations for such positions as may, from time to time, be designated by the President . . .
>
> "2. Where competition is not restricted solely to veterans, provision should be made for adding points to the earned ratings of veterans who compete for positions in the Federal civil service.

"3. The Civil Service Commission should be given the authority to determine whether or not the reasons advanced by appointing officers for passing over veterans on lists of eligibles are valid . . .

"4. Veterans should be accorded special consideration in connection with any reductions in total personnel which it may be necessary for Federal agencies to work out from time to time".

"It is my understanding that H. R. 4115, as introduced by the Honorable Joe Starnes, of Alabama, is in substantial conformity with the principles above outlined". H. Rep. No. 1289, 78th Cong. 2d Sess., p. 5.

The meaning of Section 12 and the validity of the Commission's regulations thereunder must be ascertained in the light of the foregoing statements of the scope and objective of the statute as a whole.

An analysis of the statute for this purpose could well begin at either of several places. A convenient point of beginning is the substantive provision of Section 12 that the regulations "shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings". Each of these factors must be defined and related to the other. Neither is superior, although there is inherent in "military preference" the idea of a factor due to military service alone which otherwise would not exist. On the other hand, the very use of the phrase "military *preference*" instead of "military *service*" in this context shows that there are other factors or incidents of employment, concerning non-veterans as well as veterans, which must be weighed in the scales with the fourth, "military preference", before the effect of the latter can be ascertained. The task of statutory construction is to ascertain the mean-

ing or content of the "preference" here referred to and the point or points at which it turns the scales in favor of the veteran [10] in relation to the non-veteran.

Meaning of "military preference" under Section 12. The terms tenure of employment, length of service, and efficiency ratings, considered alone, are known quantities requiring no definition in the Act. "Tenure of employment" refers simply to the degree of permanency of employment as shown by personnel records. It was unnecessary for the statute to define the term and it does not do so. So too with length of service; it is the product of a mathematical calculation from the personnel records. Efficiency ratings also need no special statutory definition. An employee's records show whether his rating is "good", "excellent", or the like.[11]

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[10] The term "veteran" is used as including one who derivatively acquires preference through a veteran, as a wife or widow.

[11] The Commission has assigned numerical scores to efficiency ratings geared to the scoring of length of service. Such scores have varied widely since adoption of the Veterans' Preference Act of 1944. The regulations first issued under the Act gave 1 retention credit for each year of service, plus points for efficiency weighted at 80 for "good", 88 for "very good", and 96 for "excellent". Thus "an employee with a rating of 'very good' has an advantage over a 'good' employee equal to 8 years of seniority. An 'excellent' employee has an advantage over a 'good' employee equal to 16 years of seniority". See *Questions and Answers on New Reduction-in-Force Regulations*, U. S. Civil Service Commission Release (Aug. 8, 1944); *Departmental Circular No. 510*, § 2, (Nov. 15, 1944), 9 F. R. 13700. Increased weight was later given to length of service in relation to efficiency, by allowing one point for each year of service plus 5 points for "excellent" efficiency rating. Regulations, § 12.302(c), 10 F. R. 12181 (Sept. 27, 1945). This was in turn amended by adding 3 points for efficiency ratings of "very good" and 1 point for "good". Regulations, § 20.2(c), 12 F. R. 1391 (Feb. 25, 1947).

"Military preference" alone of the four factors is not self-defining, but calls for its particular definition when used in Section 12 where reduction-in-force is the employment problem dealt with.

Military preference has no fixed meaning. It varies throughout the statute. While the persons given "preference" under Section 2 of the Act may be ascertained from the personnel records, the "preference" accorded is an unknown quantity applicable to this known class of persons until its content is disclosed by the provisions of the statute covering a particular employment problem. This scheme of the statute is made plain by illustrations drawn from its text. Thus, those with military preference who *apply* for positions are given five points not available to others, Sec. 3, and their names are listed on appropriate registers ahead of all others having the same rating. Sec. 7. This constitutes their "preference". If the applicant is a wounded veteran, ten points are given, Sec. 3, and (except in professional or scientific positions with salaries exceeding $3000 per year) their names are placed at the top of appropriate registers in accordance with their augmented ratings. Sec. 7. If the applicant is the wife or widow of such a veteran, the same is true. *Id.* Again, if the functions of an agency are *transferred,* those with military service in such agency are transferred to the absorbing agency if they are qualified before that agency may employ anyone from another source. Sec. 12, third proviso. They do not replace non-veterans in the absorbing agency; they are preferred over new employees. This constitutes their "preference". Again, if there is an *examination* for guards, elevator operators, messengers, and custodians, and veterans are available, they have a monopoly of these positions. Sec.

3, proviso. This is their "preference" in this particular situation.

On the issue here involved, reduction-in-force, we look to Section 12 for the content of the preference. This content is found entirely in the first and second provisos of that section. It has the weight there given and nothing more. The first proviso makes clear that time spent in the armed services is to be counted in length of total service. This is the initial statutory content of military preference in reduction-in-force, and is a principle not found in the texts of the Acts of 1876, 1912, 1919 and 1929 on this subject. *Infra,* p. 59. By Section 12, that principle applies generally throughout the veteran's period of service, thus settling for Government employment a problem left open as to private employment in *Trailmobile* v. *Whirls,* 331 U.S. at 60. The content of the preference is completed by the second proviso, which deals solely with the factor of efficiency. It provides that a veteran, whose length of service now includes the period of his military service, shall in addition, if his efficiency rating is "good" or better, be preferred over "all other competing employees", and if his efficiency rating is below "good" he shall nevertheless be preferred over "competing non-preference employees" with the same or lower efficiency ratings. In other words, the veteran's rating of "good" is superior to the non-veteran's rating of "very good" or of "excellent". The second proviso, read in the full context of Section 12, is related solely to this efficiency factor. It modifies only the efficiency rating language of the provision to which it is attached. It does not purport to read out of the statute the preceding language which specifies that effect be given also to tenure of employment and length of service.

This is the full statutory definition of "military preference" as used in Section 12 where reductions-in-force are involved. It has to do with length of service and efficiency ratings; it constitutes modification of each of these factors in favor of the veteran. It does not remove the necessity of comparing this modified status of the veteran's length of service and efficiency ratings with the length of service and efficiency ratings of the non-veteran. These have not been eliminated from the statute but merely modified in his favor where the veteran is involved. The second proviso cannot be read in isolation from the language which precedes it and which it qualifies.

Relation of "military preference" to the other three factors in Section 12. With the definition of "military preference" in mind, we are now in position to read with meaning the provision that "in any reduction in personnel . . ., competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings . . ." Having in mind the meaning of each of these four factors to be given effect, the remaining task of statutory construction is to relate these factors to each other and thus to ascertain the scope of permissible regulations. We have seen that where a veteran is concerned, two of the other three factors are modified; that is, time in the armed forces is included in his total "length of service"; and "efficiency ratings" are weighted in his favor. Length of service and efficiency ratings, both as modified in favor of the veteran, and tenure of employment, are now to be given effect in the process of grouping, or ranking, of employees for purposes of reduction-in-force. Each is to be given due

effect in relation to the other according to its nature and meaning; the hitherto unknown quantity "military preference" now becomes a part of length of service and of efficiency ratings whenever a veteran is involved. Whatever method or order of grouping is adopted, the veteran with a rating of "good" is to be preferred over the non-veteran having the same tenure and aggregate length of service. This is the total of the meaning of "military preference".

We do not suggest that the Commission, in relating all factors, is required to establish infinite gradations of length of service, counting the exact days, weeks, months or even years. The Commission is not without discretion, for administrative convenience or because of sound employment policy, to determine what period or periods of service shall be considered of equal weight; i.e., whether to give the same number of retention credits for each year, three-year or at most five-year period, or whether to give increasing weight as the years of service increase. In keeping with the second proviso, the veteran with a rating of "good" would be preferred over the non-veteran with the same tenure and total period of service, whatever method is adopted to determine that period.

In this way, we "construe the separate provisions of the Act as parts of an organic whole, and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits". *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285. See also *McDonald* v. *Thompson*, 305 U.S. 263, 266; *Petition of Public National Bank of New York*, 278 U.S. 101, 104; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115.

This analysis of "military preference" under the Act accords with the statutory objective to aid the veteran in obtaining a new position in Government service. It also gives him special consideration in reestablishing himself in Government service if he had previously been employed there, but without committing the error of setting him above and apart from the national interest by a form of super-seniority.

In establishing Sub-group A-1, the Commission gave greater than this defined weight to military preference and failed to give due effect to each of the factors set forth in Section 12. Absolute effect is given by the Commission to tenure of employment in the first step in the process of grouping by placing in group A both veterans and non-veterans with permanent tenure. The second step in the process performed by the Commission, however, includes in Sub-group A-1 only veterans who have a "good" or better efficiency rating, excluding all non-veterans. The Commission in this manner fully completes its basic grouping, and in neither of the two critical steps thus taken, which determine the decisive order in which employees are to be selected for reduction-in-force, is length of service even considered. The Commission should have suspended its completion of the basic grouping until length of service was accorded weight. The Commission, however, excludes all consideration of length of service, on whatever basis, between the employees as a whole and limits its effect only to those which it places in sub-groups set up, in disregard of this factor, separate and apart from one another. This gives length of service no true significance in the regulations. It reduces this factor to a third-rate item used merely as a convenient method of distinguishing between employees already grouped

without regard to length of service. Clearly length of service is entitled, by its place in the statute as well as by its nature, to consideration in determining the composition of the groups themselves. This is the crux of the matter.

Respondents urge that the regulations properly give "greater weight" to military preference than to length of service, and that petitioner seeks greater weight to length of service than to military preference. The fallacy of this contention is its assumption, first, that one of these two factors must be chosen for greater weight rather than that each be given its true weight; and, second, that petitioner in any manner subordinates military preference. No choice between the two is presented when each is given its true meaning and effect. Petitioner gives to "military preference" the full weight given by its statutory meaning. The point is that the Commission has failed to give appropriate weight to length of service. The importance of length of service in the statutory scheme is emphasized by the first proviso in reserving for the veteran in computing his total service the period of his armed service. We submit that this factor cannot be left out of consideration in the ranking or grouping of veterans *vis-a-vis* non-veterans, as the Commission has done.

Respondents argued below that Section 12 "commands" the establishment of Sub-group A-1, giving "military preference" an absolute effect in reductions-in-force. But where Congress intended that veterans be given absolute preference under this Act it used plain words manifesting that intention. For example, Section 3 provides that in examinations for guards, elevator operators, messengers, and custodians, "competition shall be restricted to persons entitled to prefer-

ence under this Act as long as persons entitled to preference are available". Section 7 provides that 10-point preference eligibles, as defined in Section 3, go to the top of the appropriate register for employment (except in professional or scientific classifications with salary exceeding $3000 per year), instead of being entered "ahead of all others having the same rating", as in the case of 5-point "preference eligibles".

These are instances of high preference given certain veterans on *entrance* into Government employment. There is no such legislative directive that absolute preference be given "preference employees" in Section 12. In fact the third proviso of that very section, likewise applicable to "preference employees", provides that where functions are transferred to a new agency, preference employees shall be transferred to that agency for employment in positions for which they are qualified before "additional employees" are appointed "from any other source". These "preference employees" as that term is used and understood in Section 12 have no absolute preference to displace non-veterans already employed. *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 9-10.

It is obvious that if the Commission has not departed from the statute in disregarding length of service in the basic groupings, then it assuredly has departed from the statute in giving tenure of employment the effect accorded by its regulations. In other words, if the Commission is correct in arguing that it cannot give effect to length of service in the basic grouping because under the second proviso it must give absolute preference to the veteran with a "good" rating, then at the same point it must disregard tenure of employ-

ment as well as length of service. Any construction of the second proviso which justifies such disregard of length of service necessarily carries down with it any justification for giving effect to tenure of employment in the basic grouping. Such a construction would require that regardless of both tenure and length of service a veteran's efficiency rating alone, if "good", furnishes the basis for the first grouping of all "competing employees". The Commission cannot in reason have it both ways.

The point becomes clearer if we read the second proviso as the Commission reads it:

> Provided further, That preference employees whose efficiency ratings are good or better shall be retained in preference to all other competing employees *with the same tenure of employment but without regard to length of service,* and that preference employees whose efficiency ratings are below good shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings *and the same tenure of employment, without regard to length of service.*

The Commission thus fully recognizes that the preference granted the veteran by the second proviso on the basis of efficiency rating does not require the Commission to disregard tenure of employment, and accordingly that the preference is not absolute. By the very same reasoning the Commission must recognize that the same preference provision does not require it to disregard length of service.

The character of the "due effect" required to be given to each cannot be so distorted as first to give one factor, tenure of employment, absolute effect, then to give military preference absolute effect, and to give

the other factor, length of service, no effect in the original grouping. The unreasonableness of this construction is seen in the fact that at the outbreak of World War II, only a six-month probationary period was required to establish permanent tenure for purposes of the present reduction-in-force regulations.[12] Indeed a returning veteran may have established permanent tenure by serving only a few weeks or days in a probationary period before his induction, since time spent in military service is counted to complete the probationary period. *Departmental Circular No. 438,* October 22, 1943, 12 F.R. 1283 § 2.113. Yet under respondents' construction the veteran with a rating of "good" who has established his "permanent tenure" in this manner is given absolute preference over the most seasoned career employee with many years of service and an excellent efficiency rating.

As already stated, petitioner's position in that regard does not make length of service or any other factor controlling unless in fact any one factor in the case of any particular employee is decisive by reason of all others being equal, except of course a rating of "good" held by a veteran always supersedes a "good" or better rating of a non-veteran with equivalent tenure and service. This gives effect to length of service, with more reason, only as the Commission has given effect to tenure of employment when it is of higher character. Once

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[12] Rule VII 2(c), U. S. Civil Service Commission, 5 F. R. 4447 November 13, 1940. For war service appointments made after June 8, 1942, the "trial period" was one year. *Departmental Circular 323,* Feb. 28, 1942. Such war service appointees are normally not embraced in retention group "A" under existing reduction-in-force regulations. § 20.3. The probationary period for permanent appointments is now one year. Rule I, § 2.113, 12 F. R. 1283 (Feb. 25, 1947).

the advantages of military preference are added to the retention status of a veteran, there is no question of subordination or, conversely, of a controlling effect, except as these added criteria give the advantage to the veteran which otherwise would not exist. This is his preference. The statute however does not, as the Commission does, eliminate length of service as a measuring rod in the competition between veteran and non-veteran. The statute steers a middle course, rejecting sole reliance on either seniority or military service, in line with Congressional rejection of the 1943 and 1947 veterans' preference bills based on these factors alone. *Infra*, pp. 51, 71-72. If tenure of employment can be considered in establishing basic groupings it follows that length of service should be so considered.

The same result is reached by examining the issue in an alternative manner from the standpoint of the scope of the phrase "all other competing employees" in the second proviso. The Commission's argument begs that question as the opinion below points out (R. 56). The term "competing employees" is not defined in the Act or the regulations. § 20.2. Its broadest interpretation is presumably all Government employees on the same "competitive level", that is, in the same grade of the same trade in which interchange is feasible, as defined in the regulations (§ 20.2(j)), in all agencies anywhere in the United States. Obviously it must first be narrowed to the "competitive area", that is, the field installation of the particular "government entity". §§ 20.2(h) and (i), 20.7. For purposes of this further analysis, let us re-examine the statutory language:

> "*Provided further*, that preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose

efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings".

In its basic groups the Commission gives preference to the non-veteran with permanent tenure over the veteran with inferior tenure even though the latter has a "good" or better efficiency rating. It thus recognizes either that tenure must be given due effect among *all* shipfitters in the Charleston Navy Yard, or that "all other competing employees" excludes shipfitters in that Yard having war service tenure. On either construction, there is no basis for omitting comparable important consideration of length of service which, like tenure, must be given "due effect".

In our view, the phrase "all other competing employees" takes its content, in the natural reading of the language, from the efficiency rating context of the second proviso; that is, a veteran with a "good" rating takes precedence in efficiency rating over veterans and non-veterans with a lesser rating and over non-veterans with an equal or even a higher rating. *Supra*, pp. 35-38. There is no material difference in this respect between the first and second clauses of the proviso growing out of the difference between the terms "all other competing employees" and "competing non-preference employees" etc. The variation in language arises simply because an efficiency rating of less than "good" supersedes in rank nothing but the equivalent rating of a non-veteran; whereas the "good" rating of a veteran outranks all non-veterans' ratings, from "excellent" down. As shown above, pp. 37-39, the second proviso as a whole is attached to the preceding provision and has no meaning which is separate and apart from the language which it qualifies, namely that relating to efficiency ratings. It cannot be read to destroy the other

preceding language which specifies that effect must be given to tenure of employment and length of service, unless that conclusion is assumed in advance by an unwarranted construction of the phrase "all other competing employees".

Sub-group A-1 exceeded the Commission's discretion. The foregoing has demonstrated that Sub-group A-1 is neither required by the statute nor justified by any reasonable test of statutory discretion. To conclude that the insignificant weight given to length of service therein is permissible under the statute is to say that the Commission is at liberty to divide Federal employees into groups which fix their retention status on reduction-in-force without regard to length of service, in the face of the statutory requirement that due weight be given the length of service of all employees. Length of service cannot be given effect among the employees as a whole if it is only given effect as the Commission does within separate compartments or sub-groups of employees established without the interplay of this factor between the members of these separate sub-groups. This inferior weight to length of service, alone of the statutory factors, cannot reasonably be read into the statute. It practically wipes out all significance of years of faithful service, which were required by Congress to be given effect on an equality with the other factors. Length of service is used only as a measuring rod between those whose principal status has already and otherwise been fixed. Congress did not so intend. The importance Congress attached to length of service is shown not only by its inclusion among the basic factors to be given effect, but by the terms of the first proviso of Section 12, which makes certain that service in the armed forces be included in the veteran's total length of service. In ascertaining

the intent of Congress, appropriate effect must be given to these clauses and parts of the section. See cases cited *supra*, p. 39. The process of interpretation "misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve". *Markham* v. *Cabell*, 326 U.S. 404, 409. Respondents' construction moreover leads to unjust and unreasonable results that should be avoided in determining the Congressional purpose. *Infra*, pp. 73-78. Length of service being one of the basic facts to be given effect, it must be felt in the basic groupings, else it cannot be said the Commission has remained within the scope of the discretion provided by the statute. *Cf. Addison* v. *Holly Hill Fruit Products Co.*, 322 U.S. 607, 616-618.

Nor has the Commission here exercised the discretion, which we concede, *supra* p. 39, to determine what period or periods of service may be equated for purposes of retention. If appropriate sub-groups had been established by the Commission on that basis, the veteran with "good" efficiency within each such sub-group would have been retained in preference to all non-veterans with equivalent tenure and length of service.[13] Instead of establishing sub-groups on this basis,

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[13] For example, a type of grouping conforming to petitioner's interpretation while maintaining the general framework of existing regulations, is the following:

Group A—Veterans and non-veterans with permanent tenure and efficiency ratings of "good" or better, ranked in sub-groups as described below in descending order of length of service (including military service), veterans being placed ahead of all non-veterans within each sub-group.

Sub-group	A-1	more than 15 years				
"	"	A-2	12	to 15	years,	inclusive
"	"	A-3	8	to 11	"	"
"	"	A-4	4	to 7	"	"
"	"	A-5	0	to 3	"	"

the Commission's Group A and Sub-group A-1 deny any effect whatever to length of service as between veterans and non-veterans. In so doing, the Commission exceeded its authority under the statute.

Within each sub-group, employees with equivalent military status would be ranked in order of efficiency and length of service as the Commission may determine in its discretion.

Group B—Veterans and non-veterans with permanent tenure and efficiency ratings below "good". Same sub-groups and veterans' preference as above.

Group C—Veterans and non-veterans serving under appointments with a time limitation exceeding one year, and having efficiency ratings of "good" or better, veterans being preferred.

Group D—Veterans and non-veterans serving under appointments with a time limitation exceeding one year, and having efficiency ratings below "good", veterans being preferred.

Group E—Veterans and non-veterans serving under appointments with a time limitation of one year or less, having efficiency ratings of "good" or better, veterans being preferred.

Group F—Veterans and non-veterans serving under appointments with a time limitation of one year or less, having efficiency ratings below "good", veterans being preferred.

Another type of grouping would place in the top group A all veterans and non-veterans with more than 15 years of service (including military service) and efficiency rating of "good" or better. Sub-groups would be established for the three categories of tenure, veterans being placed ahead of non-veterans within each sub-group. Employees with equivalent military status in each sub-group would be ranked in descending order of efficiency: i.e., a veteran with "excellent" outranks a veteran with "good" having the same period of service. Groups B, C, etc. would be established in like manner for descending periods of service.

Similar results could be obtained by assigning point credits to efficiency and length of service, weighted in the Commission's discretion, and by grouping the results in accordance with the principles above described.

2. LEGISLATIVE HISTORY OF SECTION 12

Our construction of Section 12 is supported by the immediate legislative background of the statute, the legislation and administrative practices preceding enactment, and the status of the measure in Congress subsequent to enactment.

Contemporaneous history. The Veterans' Preference Act, known as the Starnes-Scrugham Law,[14] was the outcome of eight years of Congressional consideration, beginning with H.R. 5821 and H.R. 6497 in the 75th Congress. The version introduced by Congressman Starnes as late as 1943 required that in any reduction-in-force employees within each classification to be reduced shall be released in "inverse order of the length of their total federal service", the time spent in the armed forces being included in computing length of

[14] H. R. 4115 was introduced on February 3, 1944 (90 Cong. Rec. 1233), and was referred to the Committee on Civil Service. The bill was favorably reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong. 2d Sess.), and passed the House on April 17, 1944, after brief debate. 90 Cong. Rec. 3501-3507. A Senate companion bill, S. 1762, was introduced on March 9, 1944 by Senator Scrugham (90 Cong. Rec. 2401), and hearings were held on both bills by the Senate Committee on Civil Service on May 19 and 23, 1944. See *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess. The bill was reported favorably to the Senate on May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong. 2d Sess.), and passed the Senate, as amended, without debate, on June 12, 1944. 90 Cong. Rec. 5785. The House concurred in the Senate amendments, without debate, on June 20, 1944. 90 Cong. Rec. 6283. The bill was approved on June 27, 1944. 90 Cong. Rec. 6712.

service. H.R. 882, 78th Cong. 1st Sess. Sec. 12.[15] In a letter dated February 23, 1943, the Commission advised Chairman Ramspeck of the House Committee on Civil Service that it is "opposed to the enactment of H. R. 882 because many of its features are contrary to economy and good business administration". The letter recommended changes in various sections, including the following on reductions-in-force:

> "Section 12 of the bill provides that in any reduction of personnel in any civilian service of any Federal agency employees of the class to be reduced shall be released in the inverse order of the length of their total Federal service and that time spent in active service in the armed forces shall be credited in computing total length of service. *The Commission does not believe that reductions in force should be made solely on the basis of length of service, but that consideration should also be given to the relative efficiency of the employee*". (Italics supplied.)

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[15] The section read as follows: "In any reduction in personnel in any civilian service of any Federal agency, employees within each classification to be reduced shall be released in the inverse order of the length of their total Federal service: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in such transferring agency shall first be transferred to the replacing agency, or agencies for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions".

No action was taken on the Starnes bill in 1943. By letter to Congressman Starnes dated January 31, 1944, the Commission stated:

> "In accordance with your telephone request the Commission advises you that it has again reviewed the provisions of H. R. 882 introduced by you on January 8, 1943 and advises you as follows: It will be observed that some changes have been made from the comment that was submitted to Chairman Ramspeck of the House Committee on Civil Service under date of February 23, 1943. A copy of this letter is being sent to Mr. Ramspeck . . . ."

Although the letter suggested further changes in many sections, the Commission reiterated the identical views expressed in its 1943 letter regarding Section 12, quoted above, and continued: "It is recommended that Section 12 be amended to read as follows . . ." A statement issued by the Commission on February 2, 1944, concerning the foregoing letter said in part:

> "The Commission is opposed to a provision in H. R. 882 which would provide that reductions in force should be made on the basis of length of service alone. *In its communication to Congressman Starnes, the Commission proposes a substitute provision which would provide that reduction in force would be on the basis of both length of service and relative efficiency".* (italics supplied) [Press Release, U. S. Civil Service Commission, February 1, 1944]

The bill as introduced on February 3, 1944 contained the substitute Section 12 recommended in the Commission's letter of January 31, 1944. Thereupon the Commission wrote the letter to the Chairman of the House

Committee on Civil Service, dated February 8, 1944, quoted in the House Committee Report (H. Rep. No. 1289, 78th Cong. 2nd Sess., p. 6), reading as follows:

> "H. R. 4115 has been introduced as a substitute for H. R. 882, a bill to give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed. On January 31, 1944, the Commission furnished you with a copy of its report to Representative Starnes with respect to H. R. 882. The changes which have been made in the bill are listed below.
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> * * *
>
> "Section 12. This section of H. R. 882 provided that in reductions of personnel, employees shall be released in the inverse order of the length of their total Federal service. In accordance with the suggestion made in the Commission's letter of January 31, 1944, this section has been amended in H. R. 4115 to read: . . ."
>
> "The Commission concurs in the changes that have been made and recommends approval of H. R. 4115 as introduced."

The language recommended by the Commission is substantially that embodied in the bill as enacted. Such letters serve "in the absence of contradiction by the report, as an indication of the Committee's opinion on the intended effect of the Act". *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 452; *United States* v. *Durkee Famous Foods*, 306 U.S. 68, 71. The Report itself (p. 4) contains the following comment on the Section as thus amended:

> "Section 12 provides for procedure in any reduction in personnel in any civilian service of any Federal agency, specific provisions appearing with

respect to the preferred status of veterans in retention. Provision is also made in this section directing that when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

This history before the Committee of Congress which made the significant change in the language from H. R. 882 to H. R. 4115, gives respondents no basis whatever for insisting that "the purpose of this change was to confer upon veterans preference in retention without regard to length of service" (Br. Opp. p. 10, note 5), Congressional rejection of the 1943 draft, giving sole weight to length of service, does not mean that the substituted language gave no weight to that factor. *Cf. Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 736-737, 740. Instead, the statute specifically requires and the legislative history confirms that length of service be given due effect as one of four factors, with the proviso that years in military service shall be counted toward seniority in civil service. Any other result is inconceivable in the face of the Commission's own recommendation to the House Committee and its insistence on principles of sound administration before giving its approval to the bill.

There is nothing to the contrary in the Senate action on the measure. In the course of the Committee hearings, respondent Flemming testified as follows:

"Senator Byrd. Suppose there was a general reduction of personnel in the Federal Government, which I think all of us realize sooner or later must occur. What preference will the veterans have as to the retention of jobs they may have?

"Mr. Flemming. There are three points which must be kept in mind. First of all, under this bill regulations will be required to give due effect, among other things, to length of service and then the next proviso specifies that any time spent in the armed forces shall be considered in determining seniority. The next point is really the most important. It provides that a veteran who has an efficiency rating of good or better shall be retained in preference to a *competing employee,* that is, a veteran with an efficiency rating of good would be retained in preference to a non-veteran with an efficiency rating of excellent.

"Finally when you get down below good, it provides that the veteran shall be retained in preference to the competing non-preference employees who have equal or lower efficiency ratings".[16] (italics supplied).

This statement of the effect of Section 12 must be understood in the light of our previous discussion of the statute. *Supra* pp. 35-46. The Commission's statement before the Senate Committee, whatever its meaning, cannot out-weigh the Commission's presentation to the House Committee, which made the critical change to the language requiring that reductions-in-force should be on the basis of both length of service and relative efficiency. *Supra* pp. 51-53. The Senate Commit-

[16] *Hearings on S. 1762 and H. R. 4115,* Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 27, 29. Respondent Flemming's additional testimony concerning the relation between the language of Section 12 and pre-existing practices, particularly the Act of August 23, 1912, is set forth, *infra,* p. 62 note 19.

tee did not appear to accept any interpretation differing from that understood by the House Committee, since its Report followed substantially the language of the House Report in its explanation of the meaning of the Section, as follows:

> "Section 12 provides the procedure to be followed in case of reduction of personnel in any agency, and requires that preference be given veterans. Provision is also made in this section to the effect that when functions of an agency are transferred to, or when an agency is replaced by, some other agency, all preference employees engaged in the function or functions transferred or in the agency which is replaced by another agency, shall first be transferred to the replacing agency, for employment in positions for which they are qualified, before such agency may appoint additional employees from any other source for such positions". S. Rep. No. 907, 78th Cong. 2d Sess., p. 3.

Even if respondent Flemming's statement before the Committee was more clearly directed to respondents' present interpretation, it could not prevail against the statutory plan itself, as manifested by the weight required by the statutory language to be given length of service and by the general purport of the statute when its several sections are read together and all phrases are given their appropriate meaning on the whole legislative background. See *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61 note 27; *American Stevedores Inc.* v. *Porello*, 330 U. S. 446, 451-452; *United States* v. *Townsley*, 323 U. S. 557, 560-561, 566, 570; and cases cited *supra* p. 39; *cf. Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492; *Pennsylvania R. R.* v. *International Coal Company*, 230 U. S. 184, 198-199; *Pacific Gas and Electric Co.* v. *Securities*

Exchange Commission, 127 F. 2d 378, 382 (C.C.A. 9th), affirmed by an equally divided Court, 324 U. S. 826.

Previous background. Respondents main reliance in the interpretation of the Act of 1944 is on the legislation and administrative practice which preceded it. Unquestionably one purpose of the Act of 1944 was to codify in one legislative enactment all the preference rights and privileges of veterans. 90 Cong. Rec. 3503, 3505; *cf. American Stevedores Inc.* v. *Porello*, 330 U.S. 446, 452, note 13. But it is quite plain and explicit that the Act does not embody all the content of previous laws, executive orders or administrative regulations and that significant changes were made from pre-existing practices. Inadvertent statements to the contrary may not be relied upon "to make identical that which is radically different". *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U.S. 184, 198-199. They must be disregarded in the face of the overwhelming evidence of Congressional purpose shown by the Committee Reports and the language of the statute itself. See cases cited *supra*, p. 56.

The Senate Committee Report states on this issue:

> "The Congress has long recognized the desirability of granting preference in governmental employment to former members of the military and naval forces. In the past, however, veterans' preference laws have consisted for the most part of little more than broad statements of general principles, leaving details of application and administration to Executive orders and regulations. The enactment of H. R 4115, known as the Starnes-Scrugham bill, would *for the first time bring together in comprehensive statutory form the various statutes as well as the desirable provisions of Executive orders and regulations promulgated*

pursuant thereto. In addition, the bill provides for certain preferences not accorded veterans under existing law". S. Rep. No. 907, 78th Cong. 2nd Sess., p. 1 (italics supplied).

The House Committee Report likewise states:

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. *Careful consideration has been given to its provisions in the light of past legislation and practices.* . . .

"Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program. The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions". H. Rep. No. 1289, 78th Cong. 2nd Sess., p. 3 (italics supplied).

The report goes on to list changes from previous practice under ten different sections of the bill, including Section 12 on reductions-in-force. The same Committee report then lists as superseded by H. R. 4115 the earlier statutes relied upon by the Government:

"CHANGES IN EXISTING LAW

"In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, the following preference statutes enclosed in black brackets are superseded by H. R. 4115:

[Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices. In making appointments to clerical and other positions in the executive branch of the Government in the District of Columbia or elsewhere preference shall be given to honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors, and marines who themselves are not qualified, but whose wives are qualified to hold such positions. (R. S. sec. 1754; July 11, 1919, ch. 6, sec. 1, 41 Stat. 37; June 18, 1929, ch. 28, secs. 3, 21, 46 Stat. 21, 26.)]

[* * * *Provided further,* That in making any appointments under this act to positions in the District of Columbia or elsewhere, preference shall be given to persons discharged under honorable conditions from the military or naval forces of the United States who served in such forces during the time of war and were disabled in the line of duty, to their widows, and to their wives if the husband is not qualified to hold such positions (46 Stat. 21, June 18, 1929; 13 U. S. C. 1940 ed. 203).]

[That in making any reduction of force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors (19 Stat. 169, August 15, 1876; 5 U. S. C. 1940 ed. 37). *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary (37 Stat. 413, August 23, 1912).]"

As for Executive Orders and administrative regulations prior to 1944 based on the foregoing statutes, they were so loosely worded or so readily avoided that the proportion of veterans employed varied from 3 percent in one agency to 75 percent in another. See *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U .S. Senate, 78th Cong. 2d Sess., p. 45.[17] The Commission has itself stressed the changes wrought by the Act in its recruitment and replacement policies and its procedures under war service regulations:

> "The Veterans' Preference Act redefined and consolidated into law the 5- and 10- point prefer-

[17] Compare the appraisal of administrative practices preceding the Act of 1944 given by a Subcommittee of the Senate Committee on Civil Service in its Report on S. 999, 80th Cong. 1st Sess., as follows: "Whereas in 1944, while the Nation was still in the midst of hostilities, the main purpose was to legislate into statute some form of preference which by law at that time did not actually exist. The Veterans' Preference Act of 1944 represents a reduction to statutory form of a rather large number of loosely worded and as loosely enforced Executive orders, rules, and regulations of a more or less questionable enforceability. The purpose of S. 999 is to provide a sort of administrative road map which can be followed with considerable clarity and understandability by examining, appointing, and administrative officers, and which can place disabled veterans in much stronger positions . . . ." The bill referred to would amend the Act of 1944 by requiring 10-point eligibles to have present service-connected disabilities of 10 percent or more; by requiring such eligibles to attain a passing grade of 70 before their grades were augmented by the 10-point preference rating under Section 3; and by placing at the head of appropriate registers (as provided by Section 7) only those 10-point eligibles whose service-connected disabilities were 30 percent or more. The bill was reported by the full Committee in amended form (S. Rep. 428, 80th Cong., 1st Sess.) and passed the Senate on July 23, 1947. 93 Cong. Rec. 10008 (daily ed.)

ences which had previously been provided by Executive order. It also provided for the reopening of examinations, for any position newly to be filled or filled within the previous three years, by applicants granted 10-point preference, and granted all preference eligibles separated, demoted, or suspended from the service the right to appeal to the Commission. In addition, it contained many other provisions affecting recruitment and placement policies. Much of the flexibility in procedures permitted by the war-service regulations was largely replaced by the specific provisions of the Act" *62nd Annual Report, United States Civil Service Commission* (1945) p. 43.

Section 18 of the Act provides:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith."

There is a further saving clause as follows:

"and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof".

The purpose of the latter clause is to protect the preference of peace-time veterans who were in Government employment and on civil service registers when the Act of 1944 was passed, and who otherwise would be excluded by its terms. See S. Rep. No. 907, 78th Cong. 2d Sess., p. 2; H. Rep. No. 1289, 78th Cong. 2d Sess., p. 3; *Hearings on S. 1762 and H. R. 4115,* Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., p. 50. This Court's holding to that effect in *Mitchell* v. *Cohen,* Nos. 130-131, this Term, accords with the interpretation

of Section 18 vigorously pressed by the Government in that case.[18]

The changes from previous law made by the Act of 1944 are nowhere more pronounced than in reference to Section 4 of the Act of August 23, 1912, 37 Stat. 413, which is strongly relied upon by the Government as the earlier prototype of the second proviso of Section 12.[19] The 1912 provision was as follows:

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[18] See *Petition for Certiorari in Nos. 130-131:* "It is clear from the legislative history that this 'saving clause', Section 18 of the Act, was only intended to preserve the preference rights of former 'peace-time' veterans then in government employment [citing the Committee reports], and was not designed drastically to widen the coverage of the Act because of a single erroneous ruling" (pp. 20-21). *Brief for Petitioner in Nos. 130-131:* "Section 18 was mainly inserted to preserve preferences granted under earlier statutes and executive orders, to so-called 'peace-time veterans'—those who had served in the armed service in peace time. The new preference act did not grant preference to future peace-time veterans, and Section 18 was intended as a 'saving clause' to preserve the rights of such veterans then in government employment or on civil-service registers" (p. 52).

[19] Respondent Flemming testified before the Senate Committee on Civil Service as follows:

"You will note the first part of the law provides [reading]:

'competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings'.

"I might say that our existing reduction-in-force regulations are in harmony with that.

"Then it goes on as follows:

'*Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service'.

"That reenacts a provision that has been in the law.

[Reading]:

> "*Provided*, That in the event of reductions being made in the force of any Executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary".

Even on the assumption that the Act of 1912 remained in full force by virtue of the saving clause of Section 18 of the Act of 1944, the latter section could be relied upon only by those veterans who were in Government employment and on civil service registers on the date of enactment, June 27, 1944. *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. The record is barren of evidence that any of the veterans in Subgroup A-1 on the retention registers herein satisfied

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'That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings'.

"That proviso is substantially the same as a law passed by Congress in 1912, which was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923 . . .

"The heart of the section which is the second provision, as I stated before, was reflected in an act of 1912, which applied only to the departmental service and then was extended by Executive order of March 3, 1923, to the entire service". *Hearings on S. 1762 and H. R. 4115*, Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., pp. 27, 29.

The argument already made regarding respondent Flemming's testimony (*supra*, pp. 55-56), is applicable with even greater force here, in view of the overwhelming evidence throughout the legislative history that the Act of 1912 differs significantly from and was superseded by the Act of 1944. *Infra* pp. 64-68.

that test. In any event the Act of 1944 differs from the Act of 1912 in each of the following material respects:

(i) The Act of 1912 gives veterans a preference against being "reduced in rank or salary" as well as being dropped or discharged in reductions-in-force; whereas Section 12 of the Act of 1944 applies only to furloughs or discharges in reductions-in-force. Section 14, which grants administrative appeals to veterans who may be "reduced in rank or compensation", does not grant a preference to veterans. It merely provides that veterans may not be demoted "except for such cause as will promote the efficiency of the service and for reasons given in writing". In contesting suits by demoted veterans relying on their preference under the Act of 1912, the Government takes the view that the Act of 1912 has been superseded by the Act of 1944. E. g. *Breiner* v. *Wallin*, Civil No. 7694 (E. D. Pa.). The Government's "Memorandum in Opposition to Plaintiff's Motion for Rehearing" in that case argues as follows:

> *"Section 4 of the Act of August 23, 1912 has been superseded by Section 12 of the Veterans' Preference Act*
>
> "That this was the intention of the Congress is clearly evidenced by the Report of the Committee on the Civil Service of the House of Representatives on H. R. 4115 (which was enacted as the Veterans' Preference Act of 1944) . . . from which the following is quoted:
>
> "CHANGES IN EXISTING LAW"
>
> "In compliance with paragraph 2a of rule XIII of the Rules of the House of Representatives, the following preference statutes enclosed in black brackets are superseded by H. R. 4115:

. . . [. . . *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary (37 Stat. 413, August 23, 1912).]'

"If further indicia of the intention of the Congress in this regard be deemed necessary, the attention of the court is directed to Section 18 of the Veterans' Preference Act which provides:

"All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith . . . ."

"Plaintiffs rely on the last portion of Section 18 of the Veterans' Preference Act to glean from the statute of 1912, *supra,* legal rights which are inconsistent with the Veterans' Preference Act . . . The only view of Section 18 which will not result in attributing such an absurdity to the Congress is to say that by virtue of the first portion of Section 18, the statute of 1912 has been modified to conform with the Veterans' Preference Act, and that by virtue of Section 18, only those rights conferred by earlier statutes *which are not inconsistent* with the Veterans' Preference Act are preserved".

(ii) The Act of 1912 gives preference to veterans in reductions-in-force without reference to tenure, whereas the Act of 1944 requires that due effect be given this factor. The result is that veterans with war service tenure are now denied preference over non-veterans with permanent tenure. See Regulations, § 20.3. On this ground also the Government is opposing suits for reinstatement by veterans with war service tenure who argue that the Act of 1912 remains intact. E.g., *Elder* v. *Anderson,* Civil No. 2336-47, and *Furman*

v. *Anderson*, Civil No. 2335-47, District Court of the United States for the District of Columbia. The Government's "Points and Authorities" (p. 7) in support of its motion for summary judgment in the *Furman* case, filed August 15, 1947, states in answer to the veteran's argument relying on the Act of 1912:

> "This [1912] statute is inapplicable to the cause under consideration for the following reasons:
>
> "1. The statute is superseded by the Veterans' Preference Act of 1944. The Report of the Committee on the Civil Service of the House of Representatives on H. R. 4115 (which was enacted as the Veterans' Preference Act of 1944) shows specifically under the caption 'Changes in Existing Law' that the 1912 statute would be superseded by the enactment of the Veterans' Preference Act of 1944 (Report No. 1289, 78th Cong. 2d Sess. p. 7).
>
> "2. Section 18 of the Veterans' Preference Act by its specific language supersedes any earlier statute inconsistent therewith . . .
>
> "Since the Veterans' Preference Act specifically modifies all earlier inconsistent statutes to conform therewith, no claim based on an earlier statute which is inconsistent with the Veterans' Preference Act can be maintained".

(iii) There are crucial differences in the language of the two statutes. The Act of 1944 contains provisions, not found in the Act of 1912, whereby length of service is to be given due effect along with efficiency, tenure and "military preference"; the time spent in military service is to be credited in computing total service; and preference employees with efficiency ratings of "good" or better are to be preferred over all other "*competing* employees". The Act of 1912 moreover, stands alone; whereas Section 12 of the Act of 1944 must be read in

the context of a comprehensive statute, the first of its kind on the subject of veterans' preference in Federal employment.

(iv) These obvious differences in the language and purport of the two statutes reflect obvious differences in their background and objectives. The Act of 1912 was adopted before the establishment of the classification or efficiency rating systems, as part of a rider on the annual Legislative, Executive and Judicial Appropriation Act concerning civil service tenure in the District of Columbia.[20] The Act of 1944, on the other hand,

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[20] The House Committee on Appropriations recommended Section 5 of the bill (H. R. 24023), limiting civil service tenure to five years and containing no veterans' proviso. H. Rep. No. 633, 62d Cong. 2d Sess., p. 14. The veterans' proviso was added on the floor of the House. 48 Cong. Rec. 6191. The Senate Committee on Appropriations struck out Section 5, including the proviso, and inserted a new Section 4 establishing a system of efficiency ratings for civil service employees in the District of Columbia, without the veterans' proviso. S. Rep. No. 832, 62d Cong. 2d Sess., p. 7. The Conference Agreement included both Sections 4 and 5 (limiting tenure to 7 years), with the veterans' proviso attached to each Section. H. Doc. 910, 62d Cong. 2d Sess., pp. 66-67. In this form the measure was vetoed in toto by the President, because of his objection to the 7-year clause of Section 5 and to another rider abolishing the Commerce Court. *Id.*, pp. 1-4. The measure as finally adopted and approved dropped Section 5 and retained the preference proviso as a limitation on Section 4. On enactment, the proviso applied only to the relatively small number of civil service employees in the District of Columbia. See *Wettre* v. *Hague*, 74 F. Supp. 396, 398 (D. Mass). Section 4 was amended by the Act of February 28, 1916, 39 Stat. 15, which constituted the Bureau of Efficiency an independent agency and transferred thereto the functions of the Commission under the Act of 1912. The Bureau of Efficiency was abolished by the Act of March 3, 1933, Sec. 17, 47 Stat. 1519, and its records and property transferred to the Bureau of the Budget.

is a comprehensive statute codifying Congressional policy on this subject and enacted after eight years of legislative consideration. The variations from pre-existing practices generally, and from the Act of 1912 in particular, have already been set forth. Not only is the Act of 1944 comprehensive in itself, but it is an integral part of an even broader legislative program for re-employment and rehabilitation of veterans of World War II.

This Court has rejected a literal reading of a section carried over intact from an earlier statute but placed in an amended and different statutory setting. *Clark v. Uebersee Finanz-Korporation*, 332 U. S. 480, 488-489. *A fortiori*, such an unrealistic interpretation should be rejected in the instant case where differences in the statutory language are sufficient in themselves to justify a different result, apart from major differences in the context of the particular language, section and Act.

Subsequent history. The Act of August 8, 1946, 60 Stat. 939, granted special retirement privileges to employees over 55 years of age who were involuntarily separated in a reduction-in-force after 25 years of ser-

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At the outbreak of World War II, the Commission's regulations for retention preference in reductions-in-force "were applicable only to that part of the Federal departmental service in the District of Columbia which was subject both to the Classification Act of 1923, as amended, and to the Civil Service Act, covering approximately 83,000 employees. A few civil-service rules and regulations had a bearing on reductions in force in the field service but only with respect to type of appointment and veteran preference. Greater authority was conferred upon the Commission by the Veterans' Preference Act of 1944 . . ." See *62nd Annual Report of the Civil Service Commission* (1945) p. 57.

vice, during the two-year period ending June 30, 1947. The immediate occasion for this legislation, known as the Forand Act, was stated as follows by its author in testimony before the House Committee on the Civil Service:

> "The introduction of this bill was prompted by the situation which was created in the city of Newport, R. I., when the Navy Department, in cold blood and without regard to the human element involved, discontinued the manufacture of torpedoes at the Newport Naval Torpedo Station, the oldest torpedo station in the country, and took over from a private employer a war plant at Forest Park, Ill., built with Government funds and now manned by personnel that was blanketed into the civil service, so to speak in the fall of 1945. . . .
>
> "I hold here in my hand a list of 231 employees of the Newport Torpedo Station who have been separated since last August up to May 6 of this year. Every one of the men listed on this paper has more than 25 years of service to his credit, yet in most instances he has not reached the age of 55, and thus is not permitted to receive even the reduced annuity provided in the civil-service laws for those who have reached the age of 55. Yet these men find it almost impossible to secure employment with private industry because of their age". *Hearings on H. R. 4718, Committee on the Civil Service*, House of Representatives, 79th Cong. 2nd Sess., pp. 3-4.

The hearings disclosed other such instances of drastic curtailment of Government activities in arsenals, shipyards and similar installations due to cessation of hostilities. *Id.*, pp. 15-16, 37, 38, 52. The Springfield Arsenal, for example, was cut back from 14,000 employees at the peak of war production to 2,200 shortly after V-E day. *Id.*, p. 52; see also 92 Cong. Rec. 9016,

9017, 9018. Cogent grounds were advanced for permanent legislation of this type, providing adequate retirement for employees involuntarily separated after long service. *Hearings on H. R. 4718, supra,* pp. 44-49, 53-55, 61, 62, 71-72, 98. Such permanent legislation has since been enacted. Public Law 426, approved February 28, 1948, Sec. 1.

In addition to displacement of long-service employees in drastic cut-backs, there are various references in the legislative history of the Forand Act to the displacement of career employees by returning veterans. E.g., H. Rep. 2443, 79th Cong. 2d Sess., p. 1. Such displacement would occur to some extent under valid regulations under Section 12 of the Veterans' Preference Act, varying somewhat with the type of grouping. On the other hand, many such displacements would not have occurred in the absence of Sub-group A-1 Plus. In all the circumstances, the factors entering into an appropriate retirement plan, temporary or permanent, must stand on their own merits, without implying that Congress thereby approved the Commission's particular reduction-in-force regulations. While Congress may be understood as having recognized the impact of the Veterans' Preference Act, it cannot be deemed to have passed on the validity of the regulations here involved when it enacted the Act of August 8, 1946. That statute is far from a Congressional reaffirmation of an administrative regulation of long and undisputed standing, with full consideration of its implications and validity. *Cf. Helvering* v. *Winmill,* 305 U. S. 79, 83. Rulings or regulations of the Commission, unlike *inter partes* decisions of quasi-judicial agencies, may be resorted to for guidance but are not entitled to persuasive weight. *Cf. Fishgold* v. *Sullivan Drydock & Repair Corp.,* 330 U. S.

275, 290, *aff'g.* 154 F. 2d, 785, 789-790 (C. C. A. 2d). In the construction of statutes, this Court has frequently had occasion to deny prevailing weight to subsequent legislative action, either because it was itself inconclusive or because the earlier statute itself clearly manifested the Congressional purpose. *Id.; United States* v. *United Mine Workers of America,* 330 U. S. 258, 282-283; *United States* v. *Townsley,* 323 U. S. 557, 570-572; *United States* v. *Southeastern Underwriters Association,* 322 U. S. 533, 559-560; *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 301; *Louisville & Nashville Ry. Co.* v. *United States,* 282 U. S. 740, 757-759. In *United States* v. *Townsley, supra,* three subsequent statutes were deemed based upon a misapprehension of the effect of the statute under interpretation.

In the hearings on the Forand bill, Congressman Rees, ranking minority member and more recently House Committee Chairman, remarked to one witness: "I have introduced legislation that is now pending before this Committee whereby I tried to spell out what I think the Congress intended in the Veterans' Preference Act". *Hearings on H. R. 4718, supra,* p. 9. The bill referred to would amend Section 12 of the Veterans' Preference Act by specifically placing military service ahead of all other factors in reductions-in-force. H. R. 5979, 79th Cong. 2d Sess. Congressman Rees succeeded to the chairmanship of the Committee in the 80th Congress. On January 9, 1947, he re-introduced H. R. 739, substantially to the same effect, as follows:

> "Whenever reductions in personnel, reductions in grade, or demotions are necessary in any Federal agency, employees shall be released, reduced, or demoted on an agency-wide basis in accordance with Civil Service Commission regulations which shall give effect to the following categories in the order

listed: First, to military preference; second, to tenure of employment; third, to length of total Federal service; and, fourth, to efficiency ratings: . . . *Provided further,* That regardless of the above categories veterans-preference employees shall be retained in any Federal agency over all other employees: *Provided further,* That employees having equal standing in any of the above categories shall be released upon the basis of their relative standing in the next lower category: *Provided further,* That the length of time spent in active service in the armed forces of the United States of each such Federal employee shall be credited in computing total length of Federal service: *Provided further,* That in any reduction in Federal personnel the effect given efficiency ratings shall be only upon the basis of satisfactory or unsatisfactory ratings".

The House of Representatives did not accept this sweeping amendment, giving absolute preference to veterans in reductions-in-force. The House Committee on Post Office and Civil Service drastically amended the measure and the House passed the amended bill reading as follows:

"In any reduction in personnel, including reductions resulting from budgetary limitations or administrative reorganizations in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That equal credit shall be given efficiency ratings of 'good' or better except that preference employees whose efficiency

> ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings . . ." 93 Cong. Rec. 9754 (daily ed. July 21, 1947).

The language as amended thus makes relatively minor changes in existing law. If anything, this shows that Congress does not concur in a construction or amendment of the Veterans' Preference Act of 1944 giving absolute preference to veterans in total disregard of the efficiency and seniority standing of career non-veteran employees. *Cf. Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 751; *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, 684, note 27.

In sum, the historical background of the Veterans' Preference Act of 1944 verifies and strengthens our analysis of the statute and contradicts that of the respondents embodied in Sub-group A-1. That background, when all is said and done, leaves it apparent that length of service is one of the important factors to be given weight; and it is the failure of the Commission so to do which bring the regulations into conflict with the statute.

3. HARMFUL CONSEQUENCES OF THE COMMISSION'S REGULATIONS

We are not confronted here with a borderline case in which veterans are preferred over non-veterans only slightly superior in seniority or efficiency. Petitioner had been employed in the Charleston Yard for twelve years and was rated "excellent" in efficiency (R. 4). He stood near the top of sub-group A-2 (R. 30), and had more retention credits than 131 other shipfitters

out of 143 in sub-groups A-1 and A-2 combined (R. 28-31). The bulk of the veterans retained had lower efficiency ratings and substantially lower seniority, even after crediting toward total length of service the years spent on active duty (R. 28-31).

Employment in the Charleston Navy Yard had increased from 7,000 in 1938 to 27,500 at the peak of war activity (R. 11). Most of the new employees had not had the specialized knowledge to perform the skilled tasks of building, repairing, or maintaining naval warships in the Yard during the war period. Approximately 85% of the employees now accorded veterans' preference were without prior experience in shipbuilding, and were trained by the career civil service employees whom they have now displaced under the regulations here involved (R. 12).

The Court is not left to conjecture about the impact of the Commission's regulations on efficiency of the service. The end of hostilities left the Navy with a gigantic and far-flung shore establishment approximately fifteen times larger than that existing in 1940. Within one year, civilian employment in the Navy Yards was reduced from 355,000 to 158,000 men. *Annual Report of the Secretary of the Navy* (1946) pp. 35, 40. Respondent Sullivan took occasion to stress the adverse consequences of the Commission's regulations under the Veterans' Preference Act:

> "It is, of course, inevitable that, under present regulations, many highly skilled employees will be lost. It is true that these same highly skilled employees are to a great extent responsible for the fact that our old line stations have developed, to a high degree, the ability to handle unusual and

unique industrial tasks. The older machinists, electricians and employees possess of skill in other trades could be depended upon to perform the most difficult tasks and to produce articles of highest quality dependable in service. Since a large part of the Navy's industrial operations is of a jobbing nature and of a highly specialized nature, it is indeed fortunate that this skill and ability had been well developed before the war. It is also true that the Navy was able to rapidly establish new stations at the outbreak of war because it had highly skilled personnel to call upon to serve as a nuclear force at each of the new stations. Of course, the skills and ability of individuals are independent of whether they are veterans or non-veterans. While many employees were veterans of World War I, they were, in fact, but a small percentage of the total force when World War II began. Therefore, it is safe to say that, to a large extent, the efficiency of operation of our old line stations depended on the well-developed skills of non-veterans.

"The Navy is now faced with the loss of many of these skilled persons. For the most part, veterans of World War II will be the replacements. Some of the veterans will be unskilled and others will be skilled, but in few cases will they have the necessary well-rounded experience required to meet the many complex industrial problems of jobbing activities. Without question, stations face a period of reduced overall quality and reduced ability to perform complicated and difficult tasks . . . How long this period of lessened ability will continue is unknown. . . . It will continue until the veterans now being retained in employment or newly employed absorb the "know-how" and develop the ingenuity and high skill which the old-timers had. . . . Under any circumstances this will not be an easy task and will not be accomplished except as a result of hard work carried on by alert management over a period of years" (R. 44-45).

The importance of the Navy Yards in our national defense requires little elaboration. American experience during World War II disclosed critical shortages of skilled civilian manpower for all the requirements of global war. Manpower shortages were "the greatest single problem of war procurement".[21] Invasion schedules were geared to the output of our shipbuilding and shiprepair yards.[22] The manpower needs of essential war production were balanced with those of the armed forces, with no margin to spare.[23]

Draft deferment policy was designed to retain personnel in direct order of usefulness for the civilan job to be done in aid of the armed forces afloat or in the field. At the outset of the war, the Selective Service

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[21] *Special Committee Investigating the National Defense Program, Third Annual Report*, Sen. Rep. No. 10 pt. 16, 78th Cong. 2d Sess. (March 4, 1944) pp. 23 *et seq.*; Corson, *Manpower for Victory* (1943) pp. 22-25, 102-104, 113-114.

[22] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War*, July 1, 1941 to June 30, 1943, pp. 10, 33-34; *Id., July 1, 1943 to June 30, 1945*, pp. 27, 57; *Report by the Supreme Commander to the Combined Chiefs of Staff on the Operations in Europe of the Allied Expeditionary Force, 6 June 1944 to 8 May 1945*, pp. 1, 4-5, 11-12; *Report by the Supreme Allied Commander Mediterranean to the Combined Chiefs of Staff on the Operations in Southern France, August 1944*, pp. 5-7, 32; Reports to the Secretary of the Navy by Fleet Admiral King in *U. S. Navy at War 1941-1945* (1946) p. 146. See also *Special Committee Investigating the National Defense Program, Additional Report on Shipbuilding and Shipping*, Sen. Rep. No. 10, pt. 8, 78th Cong. 1st Sess. (April 22, 1943); *Id., Additional Report on Merchant Shipping*, Sen. Rep. No. 10 pt. 18, 78th Cong. 2d Sess. (June 23, 1944).

[23] *Biennial Report of the Chief of Staff of the United States Army to the Secretary of War*, July 1, 1943 to June 30, 1945, pp. 101-107.

Administration emphasized its responsibility for occupational classification. A policy statement to local boards read in part:

> "It is the responsibility of the Selective Service System to allocate the manpower of the Nation among the armed forces, civilian activities necessary to war production, and other civilian activities essential to the support of the war effort. . . . Thus the Selective Service System, through the process of classification, must do its part to accomplish an orderly adjustment of the manpower resources of the Nation, so that all available men will properly and expeditiously be directed into that channel of activity where the Nation at war will be best served". *Local Board Memoranda, Selective Service System, 1941-1945* (1945), Memorandum No. 115, March 16, 1942.

Shipfitting was listed as a critical occupation in the essential shipbuilding and repair industry, on the lists compiled by the War Manpower Commission. *Id.*, Release No. 115, as amended August 16, 1943. The "necessary man" in a critical occupation was defined as one having the requisite degree of training, qualification or skill, who could not be replaced because of an existing shortage of trained manpower, and whose loss would seriously impair the effectiveness of the war activity engaged in. *Id.*, Memorandum No. 115, as amended Aug. 16, 1943, Jan. 6, 1944.

Federal Government employees were subject to the foregoing standards, plus the requirement that their deferment be requested by the head of the agency involved. *Id.*, Memorandum No. 115F, as amended May 18, 1944; Second Report of the Director of Selective Service, *Selective Service in Wartime* (1943) pp. 162-166, 219-222. A Government employee attempting to

volunteer for military service was denied release if the appropriate agency committee had requested or would request his deferment under the foregoing standards, unless the employee was likely to be assigned to combat duty, or his skill and ability probably would be utilized equally or more effectively in the armed forces. Executive Order 9309, Part V (Mar. 6, 1943), 50 U. S. C. App. foll. Sec. 305a. Thousands of skilled Government employees worked as volunteers in installations in war zones overseas.

Yet those very highly skilled men who in wartime were held in the shipyards rather than inducted into the armed forces, or whose years of excellent service had placed them beyond military age, are being replaced under the Commission's regulations by veterans with comparatively brief service in the yards prior to induction. And under the Commission's regulations, veterans with only a few weeks or months of Government service prior to induction can displace the most seasoned and efficient career civil service employees. *Supra*, p. 44.

This action is inconsistent with the realities of a nation at war, well comprehended by Congress when it framed the Veterans' Preference Act of 1944. The regulations are contrary to the objectives of the statute and the veterans' reemployment and rehabilitation program of which it is an integral part. They are harmful to the national defense as well as to the national economy. They strike a devastating blow at the morale, efficiency and security of the civil service. The statute should be construed to avoid such unjust and unreasonable consequences contrary to the will of Congress. *Cf. Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 488-489; *United States* v. *Rosenblum Truck*

Lines, 315 U. S. 50, 55; *United States* v. *Kirby*, 7 Wall. 482, 486-487; and cases cited *supra*, p. 33.

4. CONCLUSION

The Commission's regulations are based on a misapprehension of the meaning of military preference in Section 12 and contravene the statutory plan to give appropriate weight to efficiency, seniority and tenure in relation to military service. Sub-group A-1 is not required by Section 12 of the Act and is beyond the scope of the Commission's authority under that section.

III

PETITIONER SHOULD BE GRANTED SUCH FURTHER RELIEF ON REMAND AS THIS COURT MAY DEEM JUST AND PROPER

Whether Sub-groups A-1 Plus and A-1 are invalid either because the Commission misconceived the law or misapplied the standards prescribed, it is submitted that the judgment below should be reversed and the cause ordered remanded to the District Court with direction to accord such relief as this Court may deem just and proper or which is not inconsistent with the opinion of this Court.

Relief calls for "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially". *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620. It is recognized that this Court will not itself assume to write regulations complying with the statutory standards. See cases cited *supra*, p. 28. Further relief therefore may well take the form of directing that the mandate of the District Court be withheld pending a reasonable opportunity for respondents to promulgate new regulations for reductions-in-force of Federal Government employees.

in conformity with Section 12 of the Veterans' Preference Act as construed in the opinion of this Court herein. *Cf. Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 619-623; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 567-568; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the judgment of the court below should be reversed and the cause remanded to the District Court with direction for such further relief as this Court may deem just and proper.

CHARLES FAHY,
PHILIP LEVY,
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Attorneys for Petitioner.

March, 1948.

SUPPLEMENT

1. The Veterans' Preference Act of 1944, 58 Stat. 387, 5 U. S. C. Supp. V, Secs. 851-869, as amended, provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Veterans' Preference Act of 1944."

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments, of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; (5) widowed mothers (if they have not remarried and were widows at the time of the death or disability of their ex-serviceman son or ex-servicewoman daughter)—(A) of deceased ex-servicemen or ex-servicewoman who

lost their lives while on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or (B) of service-connected permanently and totally disabled ex-servicemen or ex-servicewomen, if said ex-serviceman or ex-servicewoman was separated from such armed forces under honorable conditions; and (6) a mother of a deceased ex-serviceman or ex-servicewoman who lost his or her life while on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), or of a service-connected permanently and totally disabled ex-serviceman or ex-servicewoman, if (A) said ex-serviceman or ex-servicewoman was separated from such armed forces under honorable conditions, (B) the mother was divorced or legally separated from the father of said ex-serviceman son or ex-servicewoman daughter, and (C) said ex-serviceman son or ex-servicewoman daughter is the only child of said mother".[1]

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), (3), (5) and (6)[2] and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided*, That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

SEC. 4. In examinations where experience is an element of qualification, time spent in the military or naval service of the United States shall be credited in a veteran's rating where his or her actual employment in a similar vocation to that for which he or she is examined was interrupted by

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[1] As amended by the Act of January 19, 1948, P. L. 396, 80th Cong., 2nd Sess.

[2] *Id.*

such military or naval service. In all examinations to determine the qualifications of a veteran applicant, credit shall be given for all valuable experience, including experience gained in religious, civic, welfare, service and organizational activities, regardless of whether any compensation was received therefor.

SEC. 5. In determining qualifications for examination, appointment, promotion, retention, transfer, or reinstatement, with respect to preference eligibles, the Civil Service Commission or other examining agency shall waive requirements as to age, height, and weight, provided any such requirement is not essential to the performance of the duties of the position for which examination is given. The Civil Service Commission or other examining agency, after giving due consideration to the recommendation of any accredited physician, shall waive the physical requirements in the case of any veteran, provided such veteran is, in the opinion of the Civil Service Commission, or other examining agency physically able to discharge efficiently the duties of the position for which the examination is given. No minimum educational requirement will be prescribed in any civil-service examination except for such scientific, technical, or professional positions the duties of which the Civil Service Commission decides cannot be performed by a person who does not have such education. The Commission shall make a part of its public records its reasons for such decision.

SEC. 6. Preference eligibles shall not be subject to the provisions of section 9 of the Civil Service Act, concerning two or more members of a family in the service, or to the provisions of section 2 of that Act concerning apportionment of appointments in the Government departments in the District of Columbia among the several States and Territories according to population, but may be required to furnish evidence of residence and domicile.

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided,* That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the

top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency of such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative upon request therefor: *Provided, further*, That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

SEC. 10. The Civil Service Commission is authorized and directed to hold an examination, during the next succeeding quarterly period, for any position to which any appointment has been made within the preceding three years, for any person included under section 2 (1), (2), (3), (5) and (6)[3] of this Act upon application for examination for any such position.

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

[3] As amended by the Act of January 19, 1948, P. L. 396, 80th Cong., 2nd Sess.

SEC. 13. Any preference eligible who has resigned or who has been dismissed or furloughed may, at the request of any appointing officer, be certified for, and appointed to, any position for which he may be eligible in the civil service, Federal, or District of Columbia, or in any establishment, agency, bureau, administration, project, or department, temporary or permanent.

SEC. 14. No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service, and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends:[4] *Provided further*, That

[4] As amended by the Act of August 4, 1947, P. L. 325, 80th Cong., 1st Sess.

the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

SEC. 16. Any preference eligible who has resigned shall, upon request to the Civil Service Commission, have his name again placed on all proper civil-service registers for which he may have been qualified, in the order as provided for in section 7 hereof, and shall then be eligible for recertification and reappointment in the order, and according to the procedure, as provided for in sections 7 and 8 hereof.

SEC. 17. The term "Civil Service Commission" or "Commission" as used in this Act shall mean the present United States Civil Service Commission or any body or person who may by law succeed to its powers and duties, or any of them, or which or who may be designated by law to perform any specific duty and possess any specific power concerning matters covered by this Act.

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, or of any department of the Government or officer thereof.

SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regula-

tions to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof.

SEC. 20. Nothing contained in this Act is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with the advice and consent of the United States Senate: *Provided, however*, That the provisions of this Act shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938.

SEC. 21. If any part of this Act shall be found to be unconstitutional, the rest of it shall be considered as in full force and effect.

* * * * * * * * * * *

2. Section 8 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, 890, 50 U. S. C. App. Sec. 308, as amended, provides in part:

SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b), shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) * * * of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and ser-

vice in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

• • • • • • • • • • •

3. Section 6 of the • • • Act of August 24, 1912, • • • 37 Stat. 555, 5 U. S. C. Sec. 652, provides:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service. . . ."

• • • • • • • • • • •

4. The pertinent sections of the reduction-in-force regulations of the United States Civil Service Commission, issued under Section 12 of the Veterans' Preference Act of 1944, 5 CFR (1945 Supp.) § 12.301 *et seq.*, as amended, 12 F. R. 1291 (Feb. 25, 1947) provide:

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE.

AUTHORITY: §§ 20.1 to 20.14, inclusive, issued under sec. 12, 58 Stat. 390; 5 U. S. C. Sup. 861.

§ 20.1 *Extent of part.* The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. They apply to all civilian employees in the executive branch of the Federal Government, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate, and those who are appointed by the President of the United States.

§ 20.2 *Definitions.* For the purpose of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former

employee with established reemployment or restoration rights, or for other reasons. However, the term does not apply to (1) termination of temporary appointments limited to one year or less, (2) retirement of employees, or (3) separations for unsatisfactory service.

(b) "Retention groups" and "subgroups" means classes of employees entitled to the same degree of retention preference on the basis of tenure of employment and veteran preference.

(c) "Retention credits" are credits for length of service and efficiency ratings in determining retention order in each retention subgroup. They are computed by allowing one point for each full year of Federal Government service plus five points for an "Excellent" efficiency rating, three points for a "Very Good" efficiency rating, and one point for a "Good" efficiency rating. This paragraph shall be effective with respect to notices in reductions in force issued on and after September 15, 1946, or, with respect to individual agencies, at any date prior thereto at the option of the agency: *Provided*, That, with respect to ungraded positions under the Navy Department this paragraph shall be effective on October 15, 1946.

(d) "Federal Government service" means the total of all periods of service eligible for consideration for civil service retirement purposes, without regard to whether the employee is eligible or will be eligible actually to receive retirement benefits. All active military service is counted whether or not veteran preference is given therefor or whether it is eligible to be considered for civil service retirement purposes. Total service shall consist only of full years of creditable service, but fractions of a year shall be considered in arriving at the total.

(e) "Efficiency rating" means (1) for employees paid under the compensation schedules of the Classification Act of 1923 as amended or of Executive Order No. 6746, the current official efficiency rating under the Uniform Efficiency Rating System; and (2) for other employees the current efficiency rating under an efficiency rating system which is in general compliance with the uniform system.

Administratively adopted efficiency rating systems not in general compliance with the uniform system may be used for determining retention credits with the prior approval of the Commission.

(f) "Veteran preference employee" means an employee entitled to veteran preference under the Veterans' Preference Act of 1944.

(g) "Department" means an entire executive department, parent organization with constituent agencies, independent establishment, government-owned or government-controlled corporation of the Federal Government, the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the executive branch of the Federal Government created by Act of Congress or Executive order.

(h) "Governmental entity" means a department, bureau of a department, parent organization, constituent agency, independent establishment, entire field installation, regional office, or field station, an operating department of the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the Federal Government created by Act of Congress or Executive order.

(i) "Competitive area" means a governmental entity, a combination of governmental entities, or that part of a governmental entity for which approval has been secured from the Commission, within which employees of a competitive level are considered to be in competition.

(j) "Competitive level" means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible.

§ 20.3 *Retention preference; classification.* For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break

in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A-1 Plus during one-year period after return to duty, as required by law.

A-1 With veteran preference unless efficiency rating is less than "Good".

A-2 Without veteran preference unless efficiency rating is less than "Good".

A-3 With veteran preference where efficiency rating is less than "Good".

A-4 Without veteran preferenee where efficiency rating is less than "Good".

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B-1 With veteran preference unless efficiency rating is less than "Good".

B-2 Without veteran preference unless efficiency rating is less than "Good".

B-3 With veteran preference where efficiency rating is less than "Good".

B-4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2(b) of the Civil Service Retirement Act, as amended.

C-1 With veteran preference unless efficiency rating is less than "Good".

C-2 Without veteran preference unless efficiency rating is less than "Good".

C-3 With veteran preference where efficiency rating is less than "Good".

C-4 Without veteran preference where efficiency rating is less than "Good". . . .

§ 20.7 *Compilation of retention register.* Whenever there is to be a reduction in force there shall first be determined the competitive level or levels to be affected. Each employee whose official position is in such a competitive level shall be considered in competition in his retention group in any reduction in force, whether he is in a duty or leave status, pay or nonpay status, or actually engaged in work in another department, another competitive area, or in another competitive level, excluding only those in the active military service of the United States or in the Merchant Marine.

A retention register shall be compiled for each competitive level in which a reduction in force is to be made, showing the names of all employees in competition by retention groups and subgroups. It shall be arranged in sequence showing subgroup A-1 plus with highest retention preference, followed in order by subgroups A-1, A-2, A-3, A-4, B-1, B-2, B-3, B-4, C-1, C-2, C-3, and C-4. Within each subgroup in retention groups A and B where some but not all employees may be affected by the reduction in force, names shall be arranged in sequence according to retention credits, with higher retention preference accorded to those with a greater number of retention credits. No computations of retention credits are necessary for employees in any retention subgroup which will not be affected by the reduction in force, in any subgroup where all of the employees are to be separated, or in retention group C. For this purpose, the employee records shall be reviewed and brought up to date with respect to length of service, efficiency ratings, and other particulars regarding which changes have occurred since the records were last made current.

This register shall be maintained in the order specified for inspection by employees, and shall at all times be available for inspection by representatives of the Commission.

§ 20.8 *Sequence of selection.* Within each competitive level, action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B, action must be taken concerning all employees with a lower number of retention credits before an employee with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two

or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy. . . .

§ 20.9 *Actions.* Employees who cannot be retained in their positions because of a reduction in force shall be separated, except as provided below. Such actions may be effective at different times within 90-day periods, each 90-day period being considered as a separate reduction-in-force program, and may be made effective without the prior approval of the Commission.

(a) *Exceptions; furloughs.* Where the reduction in force is the result of a temporary condition which is not expected to continue for more than one year, employees reached for action may, in lieu of being separated, be furloughed for a period not to exceed the unexpired portion of the period of appointment and in no case shall it exceed one year: *Provided,* That notice of furlough to employees in subgroups A-1 and A-2 with competitive status shall conform to the one-year notice rule under § 20.10. In the event that vacancies are to be filled in positions in the competitive level and competitive area from which such employees have been furloughed, such employees shall be given the opportunity to return to duty before any original appointments are made to such positions: *Provided, however,* That since no position in the agency may be filled by original appointment of a person, or by the promotion, reassignment, or transfer of a retention group B or C employee if the agency has employees in subgroup A-1 or A-2 with competitive status on leave or furlough due to reduction in force who are available and qualified to fill the position without undue interruption to the activity, such status employees in subgroup A-1 or A-2 shall be considered for such positions. Offer of recall to duty in positions of the competitive level and competitive area from which furloughed shall be made in the order of retention preference of furloughed employees. . . .

§ 20.10 *Notice to employees.* An employee in group A-1 or A-2 with competitive status affected by a reduction in force shall be given an individual notice in writing one year before the action becomes effective. His one-year notice period shall be composed of, whenever possible, at least 30

days in an active duty status; a non-duty status with pay for the duration of his leave, if any; and the balance of the year in a furlough or leave without pay status. Exceptions to this rule are authorized when the employee requests separation in lieu of furlough, or when the agency as a whole is liquidating, in which case the notice period shall terminate as of the day the agency is finally liquidated.

Each employee, except those in subgroups A-1 or A-2 with competitive status, affected by reduction in force shall be given an individual notice in writing at least 30 days before the action becomes effective. Where it is not possible to continue the employee in an active-duty status for the period specified in the notice, he shall have the greatest possible notice before he is relieved from active duty and shall thereafter be carried on the rolls for the remainder of the period. If the period of active duty after the notice is given and the period of accrued leave total less than thirty days, the employee shall be carried in a non-pay status for the remainder of the 30-day period. Notices to employees shall inform them of:

(a) The nature and effective date of the action,

(b) The proper office of the organization where he may examine a copy of these regulations and inspect the retention register and records,

(c) His right to appeal the proposed action to the Commission (departmental employees in the Washington area to the Central Office and others to the appropriate regional or branch office) within ten days from the receipt, and

(d) The procedure for exercising any restoration or reemployment rights he may have, and the channels (departmental and field) through which he may apply for other government employment. . . .

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CLERK

No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947.

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

CHARLES FAHY,
PHILIP LEVY,
WALTER B. WILBUR,
Attorneys for Petitioner.

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In the
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 560

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONER

I.

SUB-GROUP A-1 PLUS IS INVALID.

A. *The Validity Of Sub-Group A-1 Plus Is In Issue.*

The gist of the Government's argument under this head is that Sub-group A-1 Plus is not in issue, on grounds which may be stated as follows: (1) That the 61 veterans therein with ratings of "no efficiency" would have fallen within Sub-group A-1 if it were deemed necessary or desirable that they be given a pro-

visional efficiency rating during the one-year period; (2) that on the basis of new evidence, first offered in this Court by the avenue of the Government's brief, 60 of these veterans have since been rated "good" or better, while the 61st man has resigned from the service; and (3) that on the basis of such new evidence there are no shipfitters in retention group A-2 in the Charleston Navy Yard at the present time (Resp. Br. pp. 17-21).

It is submitted that the Government may not avoid separate determination of the validity of Sub-group A-1 Plus, independently of Sub-group A-1, by now denominating Sub-group A-1 Plus as "simply a subdivision of A-1 which also encompasses only veterans" (Resp. Br. p. 17). Sub-group A-1 Plus is the first of five sub-groups in Group A, superior to and separate from Sub-group A-1. It would have no purpose or application unless it differed from Sub-group A-1 in that it includes returning veterans (for one year) regardless of efficiency rating. Sub-group A-1 Plus is further distinguished from any other sub-group in Group A by the specification that it was "required by law". Apart from alleged statutory compulsion under Section 8 of the Selective Training and Service Act of 1940, the Commission asserts—though we deny—that discretionary or "regulatory" authority exists for granting veterans superseniority rights for one year following their return from military service, regardless of efficiency ratings. (Resp. Br. p. 51). The Government in effect asks this Court to take upon itself the discretionary authority vested in the first instance in the Civil Service Commission, to retain Group A, Subgroups 1, 2, 3 and 4 as now written if Sub-group A-1 Plus is held invalid on the ground it was not "required by law" This Court has declined to enter this province

belonging to the administrative agency in numerous cases already cited (Pet. Br. p. 28).

Apart from this, none of the Government's contentions meets the decisive fact that on its own construction of Section 12 of the Veterans' Preference Act of 1944, the 61 veterans in Sub-group A-1 Plus with ratings of "no efficiency" lacked the ratings of "good" or better needed to place them in Sub-group A-1 when petitioner was reached on the retention register and furloughed. Respondents' argument that these 61 veterans might or could have been given ratings of "good" or better at the time involves the very elements of conjecture and hypothesis that the Government complains of in petitioner's analysis. Non-veterans with ratings of "no efficiency" were placed at the bottom of the retention register (R. 32) and hence were furloughed before petitioner and others in Sub-group A-2 were reached. There is no foundation of record for different treatment of veterans with "no efficiency" unless Sub-group A-1 Plus is valid on the basis on which it was established, that is, regardless of efficiency ratings. Summary judgment was granted as of the date and on the basis of the retention register then in force. Petitioner was furloughed and denied the benefits of his permanent civil service status as a result of the regulations, upheld by the order of summary judgment in behalf of the Government below.[1]

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[1] The validity of petitioner's demotion from leadingman shipfitter to shipfitter maximum on January 7, 1946 is not involved in this discussion on Sub-group A-1 Plus, since the register for the category of leadingman shipfitter (R. 20-21) did not contain any veterans in that Sub-group. The demotion may be involved however, in ascertaining the appropriate remedy if Sub-group A-1 is held invalid.

There is no basis for the Government's argument (Br. pp. 13-14) that petitioner has shifted the ground of his argument from the

The Government's allegations of new facts, when properly presented and proved, will be relevant after remand to the District Court, within the framework of new regulations promulgated by the Commission in conformity with Section 12 of the Act as construed in the opinion of this Court. See Pet. Br. pp. 79-80; cf. *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 60, 61-62; *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 494; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 445-448 (C.C.A. 2d). In no event do the new facts alleged, even if properly before this Court, render moot the issue of Sub-group A-1 Plus independently of the validity of Sub-group A-1.

This is a suit to adjudge the invalidity of existing regulations which resulted in petitioner being furloughed, and equally important, to re-establish petitioner's status under valid regulations. *Cf. Mitchell* v. *Cohen*, this Term; *Truax* v. *Raich*, 239 U. S. 33; *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), *cert. den.* 323 U. S. 738; *Farley* v. *United States*, 92 F. 2d 533, 538 (App. D. C.).[2] Particularly where governmental action is involved, a prayer for declaratory judgment, like other forms of equitable relief, is addressed to judicial discretion exercised in the public interest. *Eccles* v. *Peoples Bank of Lakewood*, No. 101, this Term, decided March 15, 1948; *Great Lakes Dredge &*

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demotion to the furlough. Both are properly set forth in the complaint (R. 3-4), and the relief prayed embraces both (R. 5), as the Court may deem just and proper.

[2] The Government (Br. p. 16, note 4) correctly states that petitioner is not seeking to recover back wages in the instant suit. He would be precluded from so doing by the express limitation on the jurisdiction of the District Court. 24 Stat. 505, as amended, 28 U.S.C. Sec. 41(20).

Dock Co. v. *Huffman*, 319 U. S. 293, 297. Declaratory relief may be granted, if a "case of actual controversy" otherwise exists, "whether or not further relief is or could be prayed". 28 U. S. C. Sec. 400; *United Public Workers* v. *Mitchell*, 330 U. S. at 93. Indeed, in proper cases even discontinuance of the action complained of is no bar to appropriate judicial remedies. See *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202; *United States* v. *Trans-Missouri Joint Traffic Freight Ass'n.*, 166 U. S. 290, 307-308; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (C. C. A. 2d); *cf. United States* v. *Rock Royal Co-op Inc.*, 307 U. S. 533, 555-556; *Abie State Bank* v. *Weaver*, 282 U. S. 765, 781; *McGrain* v. *Daugherty*, 273 U. S. 135, 182; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 47; *Standard-Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 353; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452; *Fiswick* v. *United States*, 329 U. S. 211, 221-222; *Porter* v. *Lee*, 328 U. S. 246, 251.

Respondents put great stress on the allegations that all veterans presently in Sub-group A-1 Plus have ratings of 'good" or better; that all of those with "no efficiency" subsequently obtained ratings of "good" or better (except one man, who resigned); and that all the latter, with the passage of their statutory year since petitioner was furloughed on November 8, 1946, have entered Sub-group A-1. *Supra* p. 2. But respondents overlook that appropriate relief in this case calls for adaptation of court procedure "to a remolding of the situation as nearly as may be to what it should have been initially". See *Addison* v. *Holly Hills Fruit Products Co.*, 322 U. S. 607, 619-623. If, as we contend,

Sub-group A-1 Plus is invalid now and was invalid in November 1946, the fact that more than one year has elapsed is irrelevant to the restoration of the *status quo* as nearly as possible. It is a reflection on the adaptability of remedial procedure to suggest that in order to invalidate Subgroup A-1 Plus independently of A-1, petitioner or others similarly situated were required to engage in an unseemly race to obtain adjudication by this Court within one year after their furlough, under penalty of nullifying all their efforts. *Cf. Porter* v. *Lee*, 328 U. S. 246, 251.

All doubts as to facts and inferences must be resolved in favor of petitioner since the case arises on the granting of summary judgment (Pet. Br. p. 29). Respondents' contentions are at odds with the actualities of the situation, on several alternative views:

(i) The new facts alleged fail to show how many veterans in Sub-group A-1 are retained, and on what dates the 60 veterans with "no efficiency" obtained their ratings of "good" or better. When petitioner was furloughed, there were 57 employees in Sub-group A-1, an equal number in Sub-group A-1 Plus with ratings of "good" or better, and 61 in the latter Subgroup with ratings of "no efficiency". Since 60 of those in the category last named are now in Sub-group A-1, according to the Government, notwithstanding their relatively low seniority, there are obviously many more employees in Sub-group A-1 today than in November 1946. In fact, we are advised that there are 141 employees in the ship-fitter category in the Charleston Navy Yard at the present time. Consequently, if the *status quo* were restored as of the date when petitioner was furloughed, petitioner would have been retained then in place of a veteran with "no efficiency"; and petitioner would have remained in ~~their~~ his job to

this day,[3] notwithstanding the shrinkage in employment which has occurred.

(ii) Respondents new evidence fails to disclose that all 60 of the abovementioned category of veterans qualified for their ratings of "good" or better within the past year. If Sub-group A-1 Plus were eliminated, we should assume the likelihood that petitioner would not have been reached for furlough within the past year, if then. At worst, therefore, restoration of the *status quo* would today find petitioner still within his one-year furlough period. He would retain his employment status; remain subject to coverage of the Hatch Act;[4] maintain service credit toward retirement;[5] and be enrolled on the Navy Department waiting list for restoration to duty ahead of all new applicants, whether veterans or non-veterans (Pet. Br. pp. 22-23). Petitioner would also be entitled to be enrolled on the appropriate register established by the Civil Service Commission itself, for placement elsewhere in the Federal service, and for that purpose would have standing above all non-veterans and veterans (except wounded veterans). *Federal Personnel Manual* (1945 ed.) Z1-292, as amended by Commission action of March 27, 1948. The restoration of such furlough status would be particularly valuable in the present

[3] Restoration to work under these circumstances would entitle petitioner to other rights as of the date he was furloughed. A comparable situation in the Commission's regulations is restoration after transfer with reemployment rights. "He shall be reemployed within 30 days of his application in his former position, or in a position of like seniority, status, and pay, in such manner, to the extent consistent with law, that he does not lose any of the rights or benefits to which he would have been entitled had he not been transferred or released." § 10.111(b)(2), 12 F. R. 1290.

[4] Federal Personnel Manual (1945 ed.) C2-4.

[5] *Id.*; R5-25; *supra*, note 3; *cf.* 5 U.S.C. (Supp. V) Sec. 707.

period of rising defense preparations throughout the military establishment.

(iii) The fact that there are presently no shipfitter-veterans in Sub-group A-1 Plus with ratings below "good" does not prove that this did not occur in the period since he was furloughed, or that it will not occur in the future.[6] This probability, independently of the validity of Sub-group A-1, was a continuing cloud on petitioner's reemployment from the waiting list during his one-year furlough period (Pet. Br. pp. 22-23), and it remains to imperil his continuing reinstatement rights, without competitive examination.[7]

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[6] Although our military forces are presently composed of volunteers rather than men inducted under the Selective Training and Service Act of 1940 as amended, Section 8 of that Act remains in force with respect to members of reserve components called to active duty, and volunteers for active duty. See *Interpretative Bulletin and Legal Guide, Veterans Reemployment Rights* (U. S. Department of Labor, Jan. 1948), pp. 3-4; *Trusteed Funds Inc.* v. *Dacey*, 160 F. 2d 413 (C.C.A. 1st); *Hayes* v. *Boston & Maine R. R.*, 160 F. 2d 325 (C. C. A. 1st).

The Regulations on entrance ratings, as amended March 2, 1948, read as follows: "An entrance rating is an efficiency rating given to an employee when first assigned to a position in the agency or upon change in service, class or grade. If the employee had a prior official rating whether in the same or a different agency, he shall be given such rating as his entrance rating; except that (1) if that rating is "unsatisfactory" his entrance rating shall be "Fair", and (2) if the employee had a prior higher rating as his last rating in the same agency in a position of the same service, class and grade, such rating shall be used in place of the latest official rating. If the employee has no prior official rating, his entrance rating shall be "Good." *Federal Personnel Manual* (1945 ed.) c. E1-5.

[7] *Sec. 7.101* (a). A person having a competitive status at the time of separation from the Federal service may be reinstated subject to the following requirements:

"(1) Reinstatement must be made within one year of separation if the period of service was less than two years, within two years

(iv) Finally, even if restoration of the *status quo* did not result in petitioner being placed at least in furlough status, it would nevertheless have postponed for some time the end of his active duty or the end of his furlough period. Valuable rights to retirement service credits and perhaps other benefits would thereby be reestablished by the invalidation of Sub-group A-1 Plus.

On any of these alternative views of the factual situation, petitioner's cause is neither "hypothetical" nor "moot". The Act remains unchanged. *Cf. Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. The Commission instituted Sub-group A-1 Plus, retains it in force, and urges this Court to sustain its validity for the future. There is nothing moot or conjectural about petitioner being out of his job, or about his controversy over Sub-group A-1 Plus which was responsible, independently of Sub-group A-1, for petitioner being displaced by others in Sub-group A-1 Plus who had no right to do so under a proper construction of applicable law.

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if the period of service was two years or more but less than three years, within three years if the period of service was three years or more but less than four years, within four years if the period of service was four years or more but less than five years, and without time limitation if the period of service was five years or more . . .

"(4) The qualifications standards of the Commission for promotion or reassignment to the position must be met.

"*Sec. 7.104* (a). The Commission hereby delegates authority to agencies to reinstate any person who meets the requirements of Sec. 7.101 . . .

"(b) The Commission may disapprove any reinstatement, or suspend or withdraw this authority whenever, after post-audit, it finds that the regulations in this part have not been followed". 12 F.R. 1287 (Feb. 25, 1947); see *Federal Personnel Manual* (1945 ed.) R4-5 *et seq.*, A6-57.

In all the circumstances, an actual controversy is presented on the validity of Sub-group A-1 Plus, and petitioner may properly urge such invalidity as an independent cause of his displacement from civil service employment and as a continuing threat to his security and status therein.

B. *It Is Immaterial That Public Rather Than Private Employment Is Here Involved.*

Respondents attempt to distinguish the *Fishgold* and *Trailmobile* cases on the ground that they involved private employment (Br. pp. 46-48). It is true that Section 8(b) of the Selective Training and Service Act of 1940 makes a distinction between public and private employment, in that restoration is mandatory on the United States Government but not necessarily mandatory on a private employer if "circumstances have so changed as to make it impossible or unreasonable to do so". This simply states the judgment of Congress that as an example to the rest of the country, the Government in no circumstances is to be free to offer excuses for non-reinstatement, but these provisions of Section 8(b) only qualify the preceding language of that Section; that is, they apply simply to the duty of *reemployment* within 90 days after the veteran is relieved from training and service. The issue here involved, however, is whether sub-section (c) of Section 8 requires or authorizes an absolute retention preference to veterans whenever a *bona fide* reduction in force takes place during the statutory period "within one year after such restoration". In a word, sub-section (b) applies to reinstatement, while Sub-section (c) applied to retention for one year after reinstatement in either public or private employment. Only

Sub-section (c) is relevant here, and petitioner's brief was therefore directed to that Sub-section. The reasoning of the *Fishgold* and *Trailmobile* cases under Subsection (c) is fully applicable to public as well as private employment, as indeed the latter opinion recognizes. 331 U. S. at 57.

C. *Sub-group A-1 Plus Was Established In the Erroneous Belief That It Was Required By Section 8 Of The Selective Training And Service Act Of 1940.*

The Government's brief extends still further the list of explanations as to whether Sub-group A-1 Plus is the product of statutory compulsion or administrative discretion. The Government continues to reiterate, in somewhat different language, that "the establishment of that category or one similar to it is probably required by law" (Resp. Br. p. 50); but argues nevertheless that following the *Fishgold* decision the Commission continued the regulation as an exercise of discretion (*Id.*, p. 51). The plain answer is that the regulations as reissued in 1947, subsequent to the *Fishgold* decision, again recites that Sub-group A-1 Plus was "required by law". See § 20.3, 12 F. R. 1291 (Feb. 25, 1927) (Pet. Br. p. 92).

The obligation of the Commission under Section 12 of the Veterans' Preference Act of 1944 to exercise its considered discretion is not complied with by the presentation of alternative arguments for the convenience of litigation. *Cf. Chenery* v. *Securities Exchange Commission*, 318 U. S. 80, 94-95; see Pet. Br. pp. 23-26.

II.

Sub-Group A-1 Is Invalid.

A. *Section 12 of the Veterans' Preference Act of 1944 Differs Significantly From And Was Intended To Supersede Pre-existing Acts and Regulations.*

The Government's argument on this issue is summed up in its statements that the Veterans' Preference Act "was intended to codify existing veteran preferences and to subtract nothing therefrom"; and that "it was not the intention of Congress to deprive veterans of any of their then existing preferences" (Resp. Br. pp. 35, 33). We have already pointed out the fallacy of this position on the basis of the overwhelming evidence in the legislative history, the language of the statute, and the Government's own contentions in related litigation in the Federal courts (Pet. Br. pp. 58-68). A significant commentary on the Government's argument is its failure even to mention, let alone recognize the force of, Section 18 of the Veterans' Preference Act of 1944, which is set forth among the "statutes involved" in the Appendix to the Government's brief (p. 59).

We have already shown that the intent of respondent Flemming's testimony before the Senate Committee on Civil Service, even if given the scope contended for the Government, does not coincide with the purport of the Commission's statement to the House Committee, nor can it be deemed to over-ride the statutory plan itself when all clauses are read together against the entire legislative background (Pet. Br. pp. 55-57, 64-68). The contention that Section 12 of the Act is a mere reaffirmation of the pre-existing executive orders and administrative regulations cited by respondents is unsound on two counts:

First, those orders and regulations were never specifically brought to the attention of Congress throughout the legislative history. Commissioner Flemming's testimony before the Senate Committee makes general reference to these regulations, but quotes only and relies upon the retention preference provision of the Act of August 23, 1912, 37 Stat. 413. Congress can hardly be deemed to have ratified a detailed plan of regulations that was never specifically before it, let alone acquiesced in.

Second, Section 12 of the Act of 1944 differs significantly from the Act of 1912 cited by Commissioner Flemming, in that "due effect" is required now by Congress to be given to length of service and tenure of employment, along with efficiency ratings and veterans' preference; the first proviso re-emphasizes length of service; and the second proviso, dealing solely with efficiency ratings, provides that preference employees with ratings of "good" or better shall be retained in preference to "all other *competing* employees." The House Committee report correctly stresses that the Act of 1912 was superseded by the Act of 1944, and Section 18 reinforces that conclusion. The Government has itself underscored this by reading tenure of employment into the second proviso of Section 12 by its Groupings A, B, etc., while repudiating the claims of veterans that their absolute preference rights under the Act of 1912, regardless of tenure, were retained intact (Pet. Br. pp. 65-66). By the same token, due effect must be given to length of service in the basic groupings under the same regulations. Granted that each factor—tenure of employment, efficiency, length of service, military preference—must be taken into account, this must be done without excluding length of

service from due consideration (Pet. Br. pp. 48-49, note 13).[8]

The picture of statutory and administrative continuity between present law and pre-existing practices, painted in the Government's brief, hardly accords with the realities of the situation prior to 1944. The earliest requirement of veterans' preference in reduction-in-force appears in the Act of August 15, 1876 (19 Stat. 169), but that Act granted preference only when the competing veteran and non-veteran were "equally qualified". *Cf. Keim* v. *United States*, 177 U. S. 290. The later Act of August 23, 1912 provided that in the event of reductions-in-force in any of the executive departments, "no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary". This absolute requirement became law as a rider on an

[8] Respondents argue (Br. p. 37) that petitioner's construction would be disadvantageous to the unmarried widows of deceased servicemen. But the preference rights granted widows "are derivative in nature. They are conferred on the widows because of the dislocation and severance from civil life which their deceased husbands suffered while performing full-time duties and in partial substitution for the loss in family earning power occasioned by their husbands' deaths." *Mitchell* v. *Cohen*, decided March 8, 1948, Nos. 130-131, this Term. The discretionary authority vested in the Commission might well justify reasonable variations from general regulations to aid such widows in obtaining or retaining Federal Government employment in appropriate categories. No such regulation has been framed or is presented here. Of course nothing in the Act gives the widow of a deceased ex-shipfitter the position which he occupied in the Yard. Her preference is embraced in an augmented rating for a position for which she must qualify, and her retention preference thereafter must be related to that class or type of work.

annual appropriation bill applicable only to the few thousand civil service workers then employed in the District of Columbia, and was adopted at a time prior to the existence of the present classification and adjective rating systems (Pet. Br. pp. 67-68). It has since been effectuated by administrative regulation granting veterans with ratings of "good" or better absolute preference over non-veterans, and as so construed, has been extended in scope beyond the District of Columbia; but a realistic view of the situation prior to the enactment of the Veterans' Preference Act shows that these "prefrences" had little force in actual practice. *Id.*, p. 60.

The Veterans' Preference Act of 1944, on the other hand, was the product of years of Congressional consideration and arose in a legislative and national context far removed from those prevailing in earlier years. It was part of a comprehensive post-war program, novel in the history of veterans legislation, to aid in the readjustment and rehabilitation of World War II veterans, and designed to reestablish them as citizens in a healthy national economy (Pet. Br. pp. 31-34). In this statute Congress took the responsibility for prescribing definitive standards instead of allowing the Commission the sweeping discretion theretofore exercised. Sub-group A-1 grants a form of veterans' absolute preference or super-seniority in reductions-in-force, in disregard of the statutory purpose that due effect be given the efficiency and length of service of non-veterans under express provision of Section 12, never theretofore included in any statute.

B. *Sub-group A-1 Was Established In The Erroneous Belief That It Was Required By Law.*

The Commission has advised the Senate Committee on Post Office and Civil Service, by letter dated April 14, 1948 (*infra*, p. 19), that it favors the Langer Bill,[9] which would prohibit regulations whereby veterants could displace non-veterans with more than ten years of service, tenure and efficiency being equal. But the responsibility to promulgate valid regulations within the scope of Section 12 of the Veterans' Preference Act as now written rests upon the Commission it-

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[9] S. 2327, 80th Cong. 2d Sess., introduced March 16, 1948, designed "to preserve the equities of permanent classified civil service employees of the United States", would amend Section 12 to read as follows:

"Sec. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees with less than ten years of total service and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees with less than ten years of total service who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

self, and cannot be shifted to the Bureau of the Budget, to the Navy Department, or to Congress. If Sub-group A-1 were in fact promulgated as an exercise of discretion (Resp. Br. pp. 39-45) or is now retained on that basis (Resp. Br. Opp. p. 18), then the Commission should amend the regulations in line with the Langer bill, or with the detailed regulations suggested in our main brief (p. 48, note 13). The fact that the Commission has not done so, notwithstanding its approval of the bill, is the clearest confirmation that the Commission remains firm in the belief here (Resp. Br. pp. 35-39), as in the court below (R. 55), that Sub-group A-1 was required by the second proviso of Section 12. This is established beyond question in the Commission's latest official expression on the issue, in its letter endorsing the Langer bill.

When all is said and done, the record plainly shows that Sub-group A-1 is not the product of the Commission's considered discretion under the standards laid down in Section 12. The Commission's letter above cited stresses the very factors emphasized in our main brief to show the unreasonableness and injustice of Sub-group A-1, saying:

> "The Commission has been impressed with many cases where faithful efficient employees with many years of service have been discharged in reductions in force in order to retain less experienced employees with veteran preference whose total service does not exceed a few years. This is a matter of legislative policy and the Commission has hesitated to express contrary views. The Commission believes, however, that the maintenance of a career service on the basis of merit requires more protection to faithful efficient employees who have devoted the greater part of their lives to the Federal service. Many of these employees were deprived of

an opportunity to gain veteran preference by service in the armed forces solely because of the extreme importance of their work as civilians during the war period. As long as we emphasize the importance of civilian work as well as military service during a war period we should in fairness give some recognition to long and faithful civilian service in reductions in force. This bill would give added recognition to employees who have at least ten years of total Federal service."

While we contend that the Commission cannot divest itself of the responsibility for giving due effect to length of service under Section 12 as now written, and that Sub-group A-1 exceeds the bounds of permissible discretion already vested in the Commission, it is submitted that even before that issue is reached, Sub-group A-1 should be declared invalid and the case remanded for further proceedings, because that regulation was formulated and retained under the mistaken belief that it is required by law.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and upon the grounds more fully set forth in our main brief, the judgment below should be reversed and the cause remanded to the District Court with direction for such further relief as this Court may deem just and proper.

CHARLES FAHY,
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Attorneys for Petitioner.

April, 1948.

SUPPLEMENT

United States Civil Service Commission
Washington 25, D. C.
April 14, 1948.

Honorable William Langer, Chairman
Committee on Post Office and Civil Service
United States Senate
Dear Senator Langer:

Further reference is made to your letter of March 18, 1948, requesting a report on S. 2327, a bill "To amend the Act of June 27, 1944, Public Law 359, and to preserve the equities of permanent classified civil-service employees of the United States."

Under the present language of Section 12 of the Veterans Preference Act of 1944, an employee entitled to veteran preference whose efficiency rating is "good" or better is retained over all competing employees in a reduction in force, regardless of the length of service of such competing employees. This bill seeks to modify this requirement by providing absolute preference for employees entitled to veteran preference only over competing employees with less than ten years of total service. It would also modify the preference for employees entitled to veteran preference with efficiency ratings less than "good" in the same manner.

The Commission has been impressed with many cases where faithful efficient employees with many years of service have been discharged in reductions in force in order to retain less experienced employees with veteran preference whose total service does not exceed a few years. This is a matter of legislative policy and the Commission has hesitated to express contrary views. The Commission believes, however, that the maintenance of a career service on the basis of merit requires more protection to faithful efficient employees who have devoted the greater part of their lives to the Federal service. Many of these employees were deprived of an opportunity to gain veteran preference by service

in the armed forces solely because of the extreme importance of their work as civilians during a war period. As long as we emphasize the importance of civilian work as well as military service during a war period we should in fairness give some recognition to long and faithful civilian service in reductions in force. This bill would give added recognition to employees who have at least ten years of total Federal service.

For the reasons stated, the Commission recommends that the provisions of S. 2327 be enacted into law.

We have not been informed by the Bureau of the Budget whether or not this report is in accord with the President's program.

By direction of the Commission:

Sincerely yours,

HARRY B. MITCHELL
President

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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 52–53) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 54–56) has not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The petition for a writ of certiorari was filed on January 30, 1948. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether regulations promulgated by the Civil Service Commission pursuant to Section 12 of the Veterans' Preference Act of 1944, which give retention priority in government service to veterans over nonveterans who may have longer government service, are consistent with the general directives of the statute and were adopted in the proper exercise of discretion on the part of the Commission.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 19–22.

STATEMENT

Section 12 of the Veterans' Preference Act of 1944 (*infra*, p. 19) confers authority upon the Civil Service Commission to promulgate regulations governing reduction in personnel, which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings. The regulations promulgated pursuant to this section (5 C. F. R. (1945 Supp.) § 12.303; *infra*, pp. 21–22), provide in general for the division of civilian government employees into the following three groups according to their tenure of employment:

Group A, permanent employees;

Group B, employees serving under appointments with a time limitation which exceeds one year;

Group C, employees serving under appointments with a time limitation of one year or less.

Group A in turn is subdivided into five sub-groups, as follows:

Sub-group A–1 plus, Veterans for a one-year period after return to duty;

Sub-group A–1, Veterans with "good" (or higher) efficiency ratings;

Sub-group A–2, Non-veterans with "good" (or higher) efficiency ratings;

Sub-group A–3, Veterans with efficiency ratings lower than "good";

Sub-group A–4, Non-veterans with efficiency ratings lower than "good" (*ibid*).

Employees in each sub-group are assigned retention credits by allowing one point for each full year of government service, including military service, plus five points for an "excellent" efficiency rating, three points for "very good," and one point for "good." 5 C. F. R. (1945 Supp.) § 12.302 (c), as amended, 12 Fed. Reg. 1291. Employees are listed in their respective sub-groups in order of their total retention points (*Id.*, § 12.307) and reductions in force are made in any competition level by starting with the lowest sub-group, *i. e.* sub-group C–4, and selecting employees for

separation in the inverse order of the number of their retention credits. *Id.*, § 12.308.

Petitioner was employed at the United States Navy Yard, Charleston, South Carolina, as a permanent employee in the classified civil service (R. 4). Because of petitioner's non-veteran status he had been placed in retention group A–2 (R. 22). On January 7, 1946, petitioner was rerated from Quarterman Shipfitter to Leadingman Shipfitter due to reduction in work at the Yard (R. 15–16). On November 8, 1946, petitioner was furloughed without pay for a period of one year because of reduction in force (R. 23–26), although competing employees in the A–1 plus and A–1 sub-groups, with less service than petitioner, were retained in active service (R. 5). At the time of his furlough, petitioner had a total of more than twelve years of government service and had an "excellent" efficiency rating (R. 25).

Petitioner thereafter brought the instant action for a declaratory judgment, mandamus, and other relief, alleging that the regulations of the Civil Service Commission established the A–1 plus and the A–1 sub-groups, giving retention preference to veterans over non-veterans "with no regard whatsoever to relative length of service [are] unreasonable, arbitrary and capricious, without statutory warrant, and contrary to the express provisions of Sec. 12 Veterans' Preference Act of 1944 * * *" and that the application of these regulations by the Secretary of Navy had unlaw-

fully deprived him of his office as Leadingman Shipfitter (R. 5).[1] After answer (R. 7–9), both petitioner and respondents moved for summary judgment on the grounds that there was no genuine issue as to any material fact, and that judgment should be entered as a matter of law (R. 10, 52). The trial court denied petitioner's motion and granted summary judgment for respondents (R. 53) on the ground that "the regulations complained of are consistent with the letter and spirit of the Veterans' Preference Act and are in harmony with the Congressional purpose as indicated by the legislative history of the act" (R. 52). On appeal, the court below affirmed, holding that the challenged regulations were a reasonable method of applying the general command of Section 12 of the Act that, when reductions of personnel are made in the government service, competing employees shall be discharged in accordance with regulations of the Civil Service Commission which shall give due effect to tenure of employment, length of service, military preference, and efficiency ratings (R. 54–56). The court said (R. 56):

> From a practical point of view, we think that Congress meant to give the Commission a wide measure of discretion in the formulation of rules to deal with the diffi-

[1] It is not contended that petitioner's separation was not effected in full compliance with the regulations promulgated by the Commission.

cult administrative problem arising from the reduction of federal employees and the complications of veterans' rights. It did not, we think, mean to foreclose the Commission by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel. But we think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive, the courts must leave it there.

ARGUMENT

1. *Congress has provided a preference in retention for veterans over non-veterans.* (a) It is, of course, well settled that petitioner has no general and undefined right to retention in government service solely by virtue of his civil service status. The power of appointment which is possessed by the head of an executive department stems directly from the Constitution. Art. II, Sec. 1. While Congress may limit and restrict the power of removal (*United States* v. *Perkins,* 116 U. S. 483, 485), the normal rule is that, absent any express contrary provision, the power of removal is an incident of, and follows, the power of appointment. *Parsons* v. *United States,* 167 U. S. 324; see *Blake* v. *United States,* 103 U. S. 227, 231;

Keim v. *United States*, 177 U. S. 290, 293–294; *Myers* v. *United States*, 272 U. S. 52, 160–161. Such right as petitioner may have to retention in the government service therefore must be a right which is specifically conferred by statute.[2] Further, it has been the settled policy of the United States for a period of over 70 years to extend benefits with respect to employment and retention in government service to those who have served in its armed forces. Cf. Act of March 3, 1865 (13 Stat. 571); Act of August 15, 1876, sec. 3 (19 Stat. 169); Act of August 23, 1912, sec. 4 (37 Stat. 413); Act of July 11, 1919, sec. 1 (41 Stat. 37); Act of June 18, 1929, sec. 3 (46 Stat. 21). Thus the Act of August 24, 1912, sec. 6 (37 Stat. 555), which provides that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service," must be

[2] The Civil Service Act of January 16, 1883 (22 Stat. 403), contains no reference to removal except for a general prohibition against removals for political reasons or on account of marital status (Act of July 26, 1937, 50 Stat. 533). The basic Act is concerned principally with the method of exercising the power of appointment and is silent as to the status and rights of employees once appointed. The Act of August 24, 1912 (37 Stat. 555), is addressed to removals "for cause" and has not been interpreted to be applicable to removals necessitated by an administrative exigency not personal to the employees. The controlling statute which restricts the exercise of the removal power vested in an appointing officer is Section 12 of the Veterans' Preference Act of 1944, wherein is prescribed the procedures and limitations which must be observed by the appointing power in making reductions in force.

read in the light of the earlier Act of August 23, 1912 (37 Stat. 413), section 4 of which provided that: "* * * in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary." Even aside from the statutory mandates, it has been the policy of the Government to accord veterans preference in retention in civil service over nonveterans without regard to relative length of service, subject to the requirement of a good efficiency rating.[3] *Vis à vis*

[3] By Executive Order No. 3801 of March 3, 1923, preference for veterans in retention was extended to the field service. In Executive Order No. 4240 of June 4, 1925, length of service was given some recognition for the first time in reductions of personnel, but veterans with good efficiency ratings were still given absolute preference in retention *regardless of length of service.* Only as against veterans with efficiency ratings lower than good was a nonveteran given a right to retention by reason of greater length of service. By Executive Order No. 5068 of March 2, 1929, 5 C. F. R. 12.5, it was directed that if the efficiency rating of both veteran and nonveteran were equal but both less than good, the veteran had absolute preference for retention irrespective of length of service. In 1936, the regulations governing reduction in force were, by direction of the President, extended to government positions which were not under the Civil Service system (Departmental Circular No. 146, United States Civil Service Commission, October 22, 1936). No provision was yet made for centralized enforcement of the regulations in the field service. Authority to enforce the regulations throughout government service was finally vested in the Civil Service Commission by Executive Order No. 9063 of February 16, 1942.

a veteran, a nonveteran in the classified civil service has no vested right of retention in the event of a reduction in force.

(b) It is clear from the legislative history of section 12 of the Veterans' Preference Act that Congress intended to continue in effect the policy of according veterans absolute retention preference without regard to length of service. The report of the Committee on the Civil Service of the House of Representatives on H. R. 4115, 78th Cong., 2d sess., which became the Veterans' Preference Act, states that it was the purpose of the Committee to consolidate and to codify in one statute all of the then-existing preferences available to veterans with respect to government employment.[4] This same intention is evidenced by

[4] The report states in part:

"It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been in broad, general terms, and have been applied under Executive orders and regulations promulgated by the President.

"For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. Careful consideration has been given to its provisions in the light of past legislation and practices.

"* * * The committee is of the opinion there should be

the debates in Congress (90 Cong. Rec. 3502, 3503, 3505) and by the public hearings before the Senate Committee on Civil Service (Hearings before the Committee on Civil Service, United States Senate, 78th Congress, 2d sess., on S. 1762 and H. R. 4115, pp. 8, 27). The legislative history of section 12 of the Act further demonstrates that the interpretation for which petitioner contends was expressly considered by Congress and was categorically rejected. Section 12 of H. R. 882, 78th Cong., 1st sess., the bill under consideration immediately prior to H. R. 4115, read as follows:

> SECTION 12. In any reduction in personnel in any civilian service of any Federal agency employees within each classification to be reduced shall be released in the inverse order of the length of their total service: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing total length of service. * * *

In the successor bill, H. R. 4115, this section was deleted and the present language of section 12 was substituted.[5] Thereafter, testimony before the

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put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions." (H. Rep. No. 1289 (to accompany H. R. 4115), 78th Congress, 2d sess., pp. 2–3.)

[5] That the purpose of this change was to confer upon veterans preference in retention *without regard to length of*

Civil Service Committee of the Senate, which had the bill under consideration during the course of the public hearings, pointed out that the changed provision would give preference to veterans in civil service regardless of length of service.[6]

2. *The challenged regulations precisely follow the statutory mandate and do not constitute an abuse of discretion by the Commission.* (a) In view of the nature of petitioner's right, the previous history of veterans' preference in civil service, and the legislative history of the Act, the avowed purpose of which was not to deprive veterans of any preference then existing, petitioner's argument that in establishing retention sub-group A–1 the Civil Service Commission has misconceived the law and has misapplied the standards governing its discretionary authority (Pet. 12–17) is without substance. Section 12 of the Act (Appendix, *infra*, p. 19) requires that Commission regulations governing reductions-in-force of civil

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service is evidenced by a letter from the United States Civil Service Commission to the Chairman of the Committee on the Civil Service of the House of Representatives, stating:

"SECTION 12. This section of H. R. 882 provided that in reductions of personnel, employees shall be released in the inverse order of the length of their total Federal service. In accordance with the suggestion made in the Commission's letter of January 31, 1944, this section has been amended in H. R. 4115. * * *" (H. Rep. No. 1289 (to accompany H. R. 4115), 78th Congress, 2d sess., Mar. 27, 1944, p. 6.)

[6] Hearings before the Committee on Civil Service, United States Senate, 78th Congress, 2d session, on S. 1762 and H. R. 4115, pp. 33–34.

service personnel give "due effect" to four factors: "tenure of employment, military preference, length of service, and efficiency ratings." This legislative mandate was precisely followed when the Commission issued the regulations herein challenged. These regulations require first the division of all competing employees according to their tenure of office, and give absolute preference in retention to permanent employees irrespective of all other criteria. Petitioner apparently concedes the correctness of the regulations in this respect (Pet. 13). Second, the regulations weigh retention credits on the basis of efficiency ratings. Petitioner does not challenge them in this respect. The only issue raised by the case is whether, as between the two remaining statutory criteria, length of service and military preference, the Commission abused its discretion in giving greater weight to military preference.

Contrary to petitioner's suggestion that the Commission's regulations give no effect to length of service in computing retention credits (Pet. 14), it is apparent that length of service is given adequate recognition. In the majority of cases, that is the controlling factor in determining retention in competition between veteran and veteran and nonveteran and nonveteran, since, because it is a variable factor, it affords a direct basis for comparison between competing employees. On the other hand, military preference is an absolute factor. An employee is either entitled to it or he is not. Cf.

Mitchell v. *Cohen*, Nos. 130–131, this Term. The problem thus posed is which factor should determine the issue of retention preference in the case of competition between a veteran and nonveteran. The Commission, having in view the statutory mandate to give "due effect" to all four factors, the continuous policy pursued under earlier statutes, executive and administrative orders since 1876 of giving veterans retention preference, and the legislative history of the Veterans' Preference Act, resolved this problem in favor of the veteran.[7] We believe that such a decision was clearly within the Commission's competence. Cf. *Kirkman* v. *MacMorland et al.*, 71 F. Supp. 15, 20 (E. D. Pa.).[8] Petitioner, however, seeks a result which,

[7] This interpretation of the statute by the officer charged with its administration is of course entitled to great weight. *Gray* v. *Powell*, 314 U. S. 402, 412–413. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368.

[8] Petitioner urges that Section 12 provides on its face the factors which shall be given reasonable effect in determining retention in civil service, and that in no circumstances can the regulations as issued be said to fall within these (Pet. 14). Then, apparently assuming his major premise, he argues that Congress could have meant to grant "absolute preference" only where it had specifically so provided. We agree with petitioner that the Act should be construed as a whole. However, we submit that his reference to the provisions of §§ 2 and 7 which deal with the entrance of personnel into government service, cannot be read over into § 12 which deals with reduction in force. Section 2 is general in scope and defines the persons who shall be entitled to military preference in "certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions" in the various establishments of the Government. Section 3

in the case of a competing veteran and nonveteran with identical tenure and efficiency ratings, would give retention preference to the nonveteran by reason of his greater length of service, and that only when their length of service is equal should

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specifies that in all examinations to determine qualifications *for entrance* into the service disabled ex-service men and women, the wives of disabled ex-service men who cannot themselves qualify, and their widows shall have ten points added to their earned ratings. Ex-service men and women who have served in any branch of the armed forces of the United States, during any war, or in any campaign or expedition for which a campaign badge has been authorized, and have been honorably discharged are entitled to have five points added to their ratings. Section 7 provides that the names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings (as provided by section 3), ahead of all others having the same rating. This clearly refers only to *entrance* registers and lists and could have no possible bearing on *retention* registers. Even assuming that section 7 applies to section 12 by analogy, there is no basis for appellant's argument. Section 7 and section 12 are similar in structure. Section 7, as previously stated, first specifies the manner in which the names of all preference eligibles shall be entered on the appropriate appointment registers and lists of eligibles for entrance into the service. This procedure is then limited by a proviso, apparently overlooked by appellant, to the effect that preference eligibles except in the professional and scientific services entitled to ten points (disabled ex-service men, their wives and widows) *shall be placed at the top of the appropriate register* in accordance with, that is, in the order of, their respective augmented ratings. Thus the proviso of section 7 gives disabled ex-service men, their wives and widows, except in the professional and scientific service, an *absolute preference in entering federal service* just as the second proviso of section 12 gives preference eligibles with an efficiency rating of "good" or better an absolute preference in retention in federal service.

military preference determine the issue. In view of long established policy of the Government with respect to granting veterans retention preference, we submit that such a result would substantially nullify the Act.[9]

(b) Petitioner attacks chiefly that portion of the challenged regulations establishing retention preference for sub-group A–1 plus (Pet. 8–12). He urges that this case is a vehicle for the determination of whether or not sub-group A–1 plus is required by law (Pet. 9), and argues (1) that it is not required either by section 8 of the Selective Service Act (Appendix, *infra,* pp. 20–21) or by section 12 of the Veterans' Preference Act (Pet. 9–11), and (2) that it could not be validly established as a matter of administrative discretion under section 12 of the Veterans' Preference Act (Pet. 11–12).[10] We do not deem it necessary to

[9] If, as petitioner contends, the regulations of the Commission are objectionable because they do not give "due effect" to length of service, his position would be equally objectionable on the ground that it would not give "due effect" to military preference.

[10] Petitioner apparently argues that even if respondent's interpretation of the statute is correct, still this Court may grant relief sought since 61 of the personnel in sub-group A–1 plus had "no efficiency" ratings, and that hence there was no statutory authority for placing them in a retention classification above him. We are advised that all persons classified as Leadi: gman Shipfitter, which was a supervisory position, had worked their way up from lower positions and had demonstrated ability before they had been promoted to that classification. It was regarded as administratively unneces-

engage in any extended discussion regarding the validity of the "A–1 plus" category. All employees classified therein are veterans and, as we have shown above, are entitled to retention preference prior to petitioner. There thus exists no necessity for considering the rationale of the decisions of this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, and in *Trailmobile Company* v. *Whirls*, 331 U. S. 40. Those cases dealt exclusively with veterans' rights to preference in private industry under section 8 of the Selective Training and Service Act of 1940. Here the right of retention relates to federal employment and further involves primarily the Veterans' Preference Act of 1944, an act which was totally inapplicable in the *Fishgold* and *Whirls* cases. Cf. 40 Op. A. G. No. 115.

3. *The challenged regulations should not be set aside by this Court.* Since the regulations, granting of preference to veterans in retention in government service, follow a well-established policy of long standing, they should not be overthrown except for cogent reasons. Cf. *United States* v. *Philbrick*, 120 U. S. 52, 59; *United States* v. *Hill*, 120 U. S. 169, 182; *Robertson* v. *Downing*, 127 U. S. 607, 613; *United States* v. *Chicago North*

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sary to give all men who came within the A–1 plus category an efficiency rating prior to the expiration of their year of absolute preference. There is nothing to show that they would not all have been given a "good" or better efficiency rating, based on past services, had it been necessary to do so at the time of their reemployment.

Shore R. Co., 288 U. S. 1, 13; *New York, C. & St. L. R. Co.* v. *Frank*, 314 U. S. 360, 372–373. No such reasons here exist. We do not attempt to minimize the gravity of the loss sustained by a non-veteran in being separated from government employment after many years of faithful service. That, however, is a hardship which is solely within the power of Congress to relieve. And Congress is cognizant of the fact that non-veterans with many years of service are being discharged as a result of the operation of Section 12 of the Act.[11] However, it has not seen fit to enact any amendment to the Act. Finally petitioner argues (Pet. 14–15) that, inasmuch as the court below has held that the Commission was not legally required to adopt the present regulations, they are not entitled to the weight which would be accorded them if they constituted an expression of the Commission's informed discretion and that they should, accordingly, be set aside. While we argued below, and still believe, that the statutes involved required the Commission to act as it did, we are not presently seeking review of the contrary holding below, although we shall urge that point should certiorari be granted. The Commission presently is at liberty to change its regulations if it believes such action to be desirable or appropriate. The

[11] The Act of August 8, 1946, 60 Stat. 939, granted special pensions to employees over fifty-five years of age who are involuntarily separated in reduction of force after twenty-five years of service.

challenged regulations are now in force solely because the Commission so desires, and constitute accordingly a voluntary expression of the Commission's views. The most that could be accomplished by setting aside the present regulations would be to inform the Commission that it is at liberty to adopt different ones if it concluded that it is desirable to do so. But this has been accomplished by the decision below. We submit accordingly that no further action by this Court is required.

CONCLUSION

The decision below is correct and there is no conflict. Petitioner's essential complaint is directed to the Congressional policy of giving preference to veterans. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Acting Assistant Attorney General.

PAUL A. SWEENEY,
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Attorneys.

FEBRUARY 1948.

APPENDIX

The Veterans Preference Act of June 27, 1944, 58 Stat. 387, provides in part:

> SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further,* That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.
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> * * * * * *

The Selective Training and Service Act of September 16, 1940, 54 Stat. 885, provides in part:

SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) * * * of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

The pertinent regulations of the Civil Service Commission promulgated pursuant to § 12 of the Veterans' Preference Act, *supra*, provide:

Retention preference; classification. For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating is less than "Good."

A–2 Without veteran preference unless efficiency rating is less than "Good."

A–3 With veteran preference where efficiency rating is less than "Good."

A–4 Without veteran preference where efficiency rating is less than "Good."

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good."

B–2 Without veteran preference unless efficiency rating is less than "Good."

B–3 With veteran preference where efficiency rating is less than "Good."

B–4 Without veteran preference where efficiency rating is less than "Good."

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good."

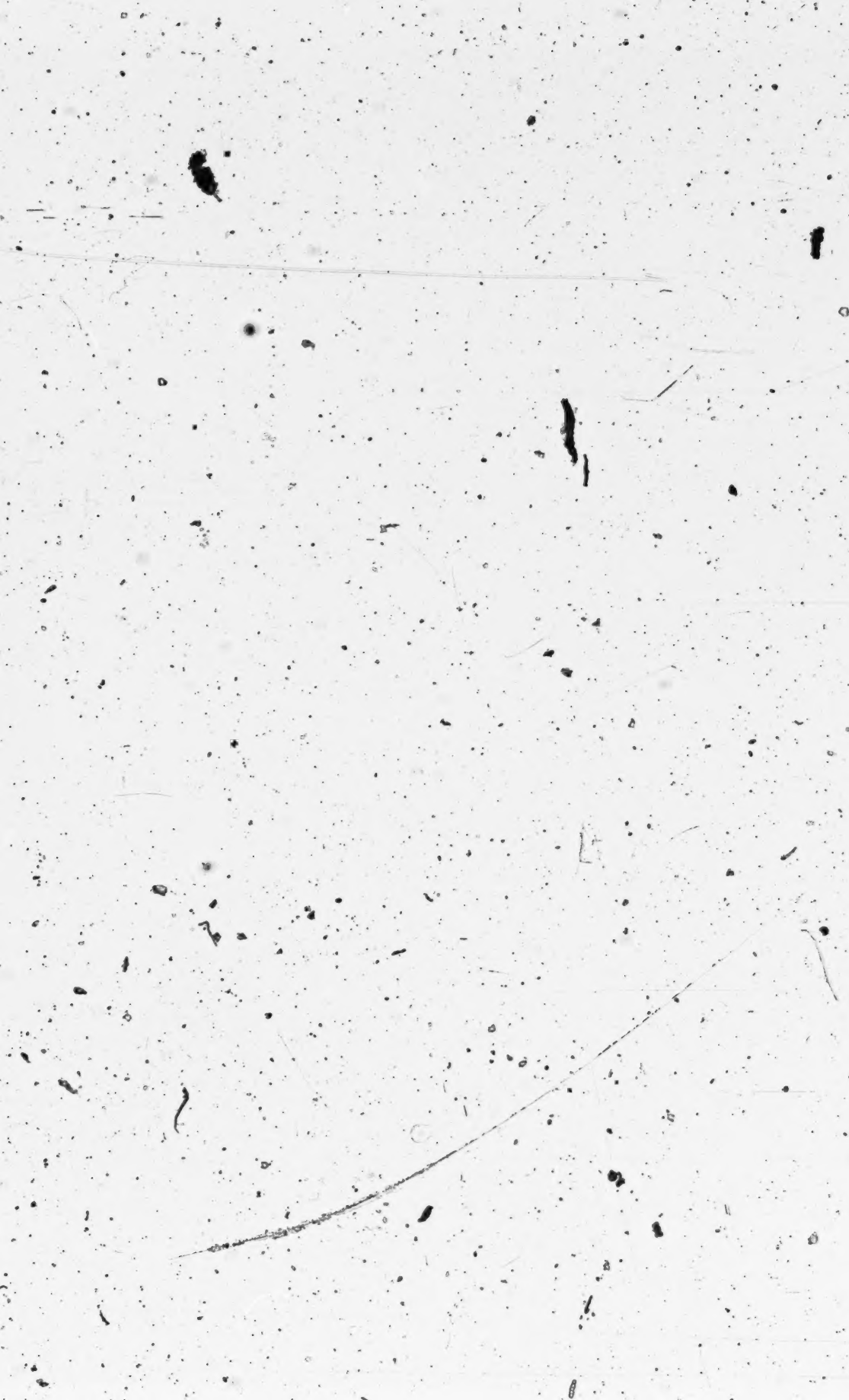
C–2 Without veteran preference unless efficiency rating is less than "Good."

C–3 With veteran preference where efficiency rating is less than "Good."

C–4 Without veteran preference where efficiency rating is less than "Good." (5 C. F. R. (1945 Supp.) § 12.303)

* * * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1945



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No. 780

In the Supreme Court of the United States

OCTOBER TERM, 1940

ELLIS W. HILLIER, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 560

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51–52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 53–56) is reported at 165 F. 2d 251.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The petition for a writ of certiorari, filed on January 30, 1948, was

granted on March 8, 1948 (R. 59). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Civil Service Commission regulations granting to veterans with an efficiency rating of "Good" or better, a retention preference over nonveterans, without regard to length of service, are valid as required or authorized by Section 12 of the Veterans' Preference Act of 1944.

2. Whether the Civil Service Commission regulations granting to newly-returned veterans a one-year retention preference over all other competing employees, whether veteran or nonveteran, are valid as required or authorized by Section 8 of the Selective Training and Service Act and Section 12 of the Veterans' Preference Act.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and regulations involved are set forth in Appendices A and B, *infra*, pp. 56–60, 61–65.

STATEMENT

Section 12 of the Veterans' Preference Act of 1944 authorizes the Civil Service Commission to promulgate regulations governing reduction in personnel, "which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." It further provides that "preference employees whose efficiency rat-

ings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *." The regulations issued pursuant to this section (5 C. F. R. (1945 Supp.) § 12.303, Appendix B, *infra*, pp. 61–65), provide in general for the division of civilian government employees into the following three groups according to their tenure of employment:

Group A, permanent employees;
Group B, employees serving under appointments with a time limitation which exceeds one year;
Group C, employees serving under appointments with a time limitation of one year or less.

Group A, in turn, is subdivided into five subgroups, as follows:

Subgroup A–1 Plus, Veterans for a one-year period after return to duty;
Subgroup A–1, Veterans with "good" (or higher) efficiency ratings;
Subgroup A–2, Nonveterans with "good" (or higher) efficiency ratings;
Subgroup A–3, Veterans with efficiency ratings lower than "good";
Subgroup A–4, Nonveterans with efficiency ratings lower than "good" (*ibid.*):

Employees in each subgroup are assigned retention credits by allowing one point for each full

year of government service, including military service, plus five points for an "excellent" efficiency rating, three points for "very good," and one point for "good." 5 C. F. R. (1945 Supp.) § 12.302 (c), as amended, 11 Fed. Reg. 8205, 9003, 9977. Employees are listed in their respective subgroups in the order of their total retention points (*id.*, § 12.307), and reductions in force are made in any competitive level by starting with the lowest subgroup, i. e., subgroup C–4, and selecting employees for separation in the inverse order of the number of their retention credits (*id.*, § 12.308). "Competitive level" is defined as "all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible" (*id.* § 12.302 (j)). For example, the P–5 attorneys in a government agency (or other competitive area as defined in the regulations) are in competition with each other, but are not regarded as competing with P–4 or P–6 attorneys. Thus, where a reduction in force occurs, P–5 attorneys are released by starting with those in subgroup C–4 with the lowest number of retention points.

Petitioner was employed at the United States Navy Yard, Charleston, South Carolina, as a permanent employee in the classified civil service (R. 3). Because of petitioner's nonveteran status, he had been placed in retention group A–2 (R. 21). On January 7, 1946, petitioner was

rerated from leadingman shipfitter to shipfitter maximum due to reduction in work at the Yard (R. 14–15).[1] On November 8, 1946, petitioner was furloughed without pay for a period of one year because of reduction in force (R. 22–25)[2] although competing employees in the A–1 Plus and A–1 subgroups, with less service than petitioner, were retained in active service (R. 4). The placing of petitioner on furlough in the reduction of personnel was effected in accordance with the foregoing regulations.[3] At the time of his furlough, petitioner had a total of more than twelve years of government service and had an "excellent" efficiency rating (R. 24).

Petitioner thereafter brought the instant action for a declaratory judgment, mandamus, and other

[1] Some confusion has arisen in respect of the supervisory position which petitioner held. Exhibit A to the stipulation (R. 14) states that he was rerated from quarterman shipfitter to leadingman shipfitter. That is incorrect. We have obtained a certified copy of original which recites that petitioner was rerated from leadingman shipfitter to shipfitter maximum. Otherwise, the original and Exhibit A correspond.

[2] The Commission has defined "reduction in force" as meaning "the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoration rights, or for other reasons." 5 C. F. R., 1945 Supp., Sec. 12.302 (a).

[3] It is not contended that petitioner's separation was not effected in full compliance with the regulations promulgated by the Commission.

relief (R. 2–6). He alleged that the regulations of the Civil Service Commission establishing the A–1 Plus and the A–1 subgroups, gave retention preference to veterans over nonveterans "with no regard whatsoever to relative length of service * * *" and were "unreasonable, arbitrary and capricious, without statutory warrant, and contrary to the express provisions of Sec. 12 Veterans' Preference Act of 1944 * * *"; and that the application of these regulations by the Secretary of Navy had unlawfully deprived him of his office as Leadingman Shipfitter (R. 4). After answer (R. 6–8), both petitioner and respondents moved for summary judgment on the grounds that there was no genuine issue as to any material fact, and that judgment should be entered as a matter of law (R. 9, 51). Petitioner's motion was supported by his affidavit (R. 10–12) and, pursuant to a stipulation (R. 13), eight exhibits relating to the policy and circumstances surrounding the dismissal of petitioner were introduced into the record (R. 14–50). The trial court denied petitioner's motion and granted summary judgment for respondents (R. 52). It stated that "the regulations complained of are consistent with the letter and spirit of the Veterans' Preference Act and are in harmony with the Congressional purpose as indicated by the legislative history of the act" (R. 51). On appeal, the court below affirmed, holding that the challenged regulations were a reasonable method

of applying the general command of Section 12 of the Act that, when reductions of personnel are made in the government service, competing employees shall be discharged in accordance with regulations of the Civil Service Commission which shall give due effect to tenure of employment, length of service, military preference, and efficiency ratings (R. 53–56). The court said (R. 56):

> From a practical point of view, we think that Congress meant to give the Commission a wide measure of discretion in the formulation of rules to deal with the difficult administrative problem arising from the reduction of federal employees and the complications of veterans' rights. It did not, we think, mean to foreclose the Commission by unequivocably requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel. But we think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive, the courts must leave it there.

That court, however, rejected the Government's contention that the Commission's regulations were required by law, stating (R. 55–56):

* * * * *

At the same time, we do not think, as appellees argue, that the regulations as drawn represent the only possible method of applying the statute. The proviso in Section 12 is that preference employees shall be retained in preference to all other "competing" employees. We think that that refers to employees competing within the bounds of such classifications as the Commission may establish by regulations, giving "due effect" to the four factors named. The regulations as drawn refer to "competitive retention groups and subgroups." The Commission could establish classifications, or groups, by a composite consideration of the four factors, and only those employees falling within a particular classification or group would be "competing."

* * * * *

SUMMARY OF ARGUMENT

Not all the questions which petitioner undertakes to raise may be adjudicated in this action, which is one primarily for a declaratory judgment that subgroups A–1 Plus and A–1 be declared invalid, coupled with a prayer that the Secretary of the Navy be directed to restore petitioner to his job as leadingman shipfitter. Subgroup A–1 Plus includes only veterans entitled to reemployment for one year over veterans and nonveterans alike, and subgroup A–1 confers retention benefits upon veterans over nonveterans Accordingly, petitioner is not in a position to question the superseniority raised by subgroup A–1 Plus as that

group operates only to confer special benefits upon a certain group of veterans. If it were invalid, the persons listed therein would fall within subgroup A–1. Inasmuch as all positions in the shipfitter's department at the Charleston Navy Yard are occupied by veterans, petitioner may not be restored unless subgroup A–1 is held invalid. Accordingly, the only issue in this case is the validity of subgroup A–1, which concededly can affect petitioner's right to reemployment.

I

Subgroup A–1 is valid.—Petitioner has no vested right to retention in government service other than that conferred by statute or regulation, as it is settled law that the power to appoint vested in the Executive branch of the Government normally carries with it the power to remove. What rights to retention petitioner has stem from Section 12 of the Veterans' Preference Act, but that section supports the classifications set up by the Civil Service Commission.

1. Prior legislation extending back seventy years has created a pattern of veterans' preferences, particularly preference in retention. Under prior statutes and executive orders, an honorably discharged veteran whose efficiency rating was "good" or better was entitled to be retained in any reduction of force over a nonveteran, irrespective of the latter's efficiency rating or length of service.

2. The legislative history of the Veterans' Preference Act discloses that it was intended to codify and strengthen veterans' preferences as established by prior statutes and executive orders. No substantial privilege was to be taken from the veterans.

3. The plain language of the second proviso to Section 12 of the Veterans' Preference Act, which provides that in any reduction in force, preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees, discloses on its face that it was intended to continue to grant veterans the same preference in retention that they had enjoyed under prior statutes and executive orders.

4. Even assuming that the second proviso to Section 12 does not have the force which we ascribe to it, nevertheless the Commission was given authority to promulgate regulations to be applicable in the event of a reduction of force and the standards to which the Commission was to give effect are tenure of employment, military preference, length of service, and efficiency ratings. The relative weight to be given to these factors was, by the statute, left to the discretion of the Commission. In formulating the regulations setting up the A–1 Plus, the A–1, and A–2 subgroups, the Commission did consider and give force to all of these elements. Petitioner's complaint that it failed to give greater force to length

of service than it did to veterans' preference is, we submit, not persuasive. The statute entrusted to the Commission exclusively the function of determining the weight to be given to each factor, and it cannot be said that the Commission has so far departed from the statutory standards as to justify setting aside the regulations.

II

Subgroup A–1 Plus is valid.—As before noted, petitioner is not in a position to question the validity of this subgroup unless subgroup A–1 be held invalid and, even then, it is extremely doubtful that he can show that he is adversely affected by the existence of this subgroup. However, Section 8 of the Selective Training and Service Act expressly provides that a person returning to government service from military service shall, under specified conditions, be restored to the position which he left with the same seniority and salary, and that he shall not be removed therefrom without cause for a period of one year. *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275, is not to the contrary. That case dealt with the return of a veteran to private employment, and the actual holding of the court was that where the veteran was furloughed for short periods of time pursuant to the terms of a union contract, it did not violate the nondischarge provision of Section 8 of the Selective Training and Service Act.

Petitioner's contention that this subgroup should be set aside in any event, because the Commission believed it was required to create this group by law and did not do so as a matter of discretion, is without merit. In the first place, we submit that the law requires the Government at least to grant unconditional reemployment to a returning veteran for a period of one year and, second, that while the Commission promulgated this regulation as a matter of law prior to the decision in the *Fishgold* case, thereafter it retained the regulation, setting up subgroup A–1 plus as a matter of judgment.

III

The relief which petitioner seeks is of a character that can be afforded only by Congress.—Petitioner seeks to set aside the Commision's regulations as not in accordance with the statute. Not only is the Commission's interpretation of the statute entitled to great weight, but, in any event, Congress has been fully aware of the manner in which the statute is being administered by the Commission, and, owing to the great interest which Congress has manifested in veterans' affairs, it cannot be presumed that it is allowing the Commission to proceed in a manner diametrically opposed to its intention. While undoubtedly petitioner has suffered personal hardship, his remedy lies with Congress, and not with the courts.

ARGUMENT

PRELIMINARY ANALYSIS

At the outset, and particularly in light of Point III of petitioner's brief, we believe it desirable to reexamine petitioners' complaint, the relief he sought in the District Court, as well as the type of relief which that court has jurisdiction to grant, for the purpose of determining the precise issues raised by this case.

In his complaint, petitioner directs his allegations principally to his demotion from leadingman shipfitter to shipfitter maximum (paragraphs 4, 12, 13; R. 3, 4, 5). He claims that the Civil Service Regulations establishing the A–1 Plus (veterans who have been back for less than one year) and A–1 (veterans with "good" or better efficiency ratings) retention groups and placing him in A–2 retention group (nonveterans with "good" or better efficiency ratings) are invalid, and prays, *inter alia*, that the Secretary of the Navy be ordered to restore him forthwith to his job as leadingman shipfitter at the Charleston Navy Yard. But the issues which he undertakes to raise, and to which he devotes the greater portion of his argument in his brief in this Court, do not deal with that job at all, but rather with the job of shipfitter maximum to which he had been rerated as of January 7, 1946, and from which he was furloughed on November 8, 1946. The complaint was never amended to conform to the

changed position, and it is extremely doubtful that under the complaint as filed he is entitled to be restored to his position of shipfitter maximum unless this Court sees fit to read specificity into his fourth prayer, which was for "such other and further relief as is just."

Assuming, however, that this Court is of the opinion that the complaint sets out a cause of action in regard to petitioner's being placed on furlough from the position of shipfitter maximum, not all of the legal questions formulated by petitioner are, we submit, presented here. Petitioner brought this proceeding under the Federal Declaratory Judgment Act (28 U. S. C. 400) to obtain a judgment declaring the legal relationships of the parties, and he prays for a declaration that the Civil Service Regulations, which establish the A–1 Plus and A–1 groups granting retention preference to veterans as against nonveterans, are, as he claims, void and of no effect and unlawful in their application to petitioner. He further prays that the members of the Civil Service Commission be directed to rescind the present regulations and promulgate new ones in conformity with the requirements of Section 2 of the Veterans' Preference Act of 1944 as declared by this Court.

In determining the issues which petitioner may here raise in regard to the validity of the Civil Service Regulations, it must be remembered that courts "have no power *per se*" to pass upon all questions raised before them. *Massachusetts* v.

Mellon, 262 U. S. 447, 488; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 544; *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324, 325, and cases cited. There must be present a justiciable "case or controversy" in the constitutional sense properly raising a question before the federal courts can assert jurisdiction to pass upon it. *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325. A prayer for a declaratory judgment under the Federal Declaratory Judgment Act does not add to the jurisdiction of this Court to grant relief since that Act applies only to "cases of actual controversy," a phrase which "has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240. In short, the Federal Declaratory Judgment Act is procedural only and does not enlarge the jurisdiction of the district courts. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324, 325; *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, 443; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.).

Tested in the light of these criteria, it is clear that petitioner is entitled to seek a declaratory judgment as to the validity of the Civil Service Regulations only if these Regulations have a direct impact upon petitioner so that he would be entitled to restoration to his position or a least the

possibility thereof.[4] Such relief might be given petitioner if it were held that the regulations adopted are invalid and that there is reasonable ground to believe that under new and valid regulations petitioner might be entitled to be restored to his former position.[5] Thus if this Court should set aside the regulation establishing subgroup A–1, and the Civil Service Commission were to promulgate new regulations, petitioner under such new regulations might become entitled to reinstatement to the position of shipfitter maximum from which he was involuntarily furloughed. To that extent, the regulation here attacked results in direct injury to petitioner, and the issue he raises as to its validity, accordingly, is a justiciable one which can be determined by this Court.

On the other hand, the regulation establishing the A–1 Plus retention group, which petitioner also attacks, has no such direct impact upon him

[4] Petitioner is, of course, not entitled to, nor apparently does he here seek, a declaratory judgment that he was illegally discharged for the purpose of recovering back salary. District courts are by statute denied jurisdiction to entertain suits for back salary, such jurisdiction being vested exclusively in the Court of Claims. *Love* v. *United States*, 108 F. 2d 43, 50 (C. C. A. 8), certiorari denied, 309 U. S. 673; *Lynn* v. *United States*, 110 F. 2d 586 (C. C. A. 5); *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), certiorari denied, 323 U. S. 738; *DiBenedetto* v. *Morgenthau*, 148 F. 2d 223 (App. D. C.), certiorari dismissed, 326 U. S. 686; Borchard, *Declaratory Judgments* (2d ed., 1941), p. 373.

[5] Such relief would also be available if the retention list had not been adhered to and persons below petitioner on the list had been retained in preference to petitioner. The complaint, however, is bare of any such allegation.

independently of the validity of the A–1 group.[6] The A–1 Plus classification is simply a subdivision of A–1 which also encompasses only veterans and is limited to veterans who have been back on the job for less than one year. It establishes a relative preference between different classes of veterans and does not bear on the relative retention rights of veterans *vis a vis* nonveterans. See 40 Opinions of the Attorney General No. 115 (September 20, 1946). If subgroup A–1 is sustainable under Section 12 of the Veterans' Preference Act, then the fact that the veterans in A–1 Plus have "super seniority" cannot affect a nonveteran, because the preference of the persons in subgroup A–1 Plus, necessarily being veterans, would be reduced, if that category were abolished, only to the extent of placing them in group A–1. Those persons, if their efficiency ratings were "good" or better, would still be entitled to priority in retention over petitioner. Accordingly, petitioner clearly has no standing to attack the validity of the A–1 Plus group unless he first succeeds in persuading this Court that the A–1 group is invalid.[7]

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[6] It should be noted that petitioner does not deny that Section 8 (b) of the Selective Training and Service Act requires the Government to reemploy veteran employees; instead, he merely asserts that Section 8 neither requires nor authorizes the creation of retention subgroup A–1 Plus.

[7] We do not, in any manner, concede that the A–1 Plus classification is improper. On the contrary, we believe, as we show *infra*, pp. 46–51, that the classification is entirely valid.

Even if the A–1 group is invalid, petitioner might not be in a position to attack the A–1 Plus group, since, because of his high position in the A–2 group (petitioner being one of the last shipfitters furloughed), the invalidation of A–1 group alone, with the consequent dropping of a number of veterans below him on the retention list, would probably result in petitioner's being entitled to reinstatement to his job. In these circumstances, the continued existence of the A–1 Plus category would not be an immediate threat to petitioner, inasmuch as A–1 Plus is only a temporary classification, the effect of which has already been largely dissipated.

Petitioner seeks to evade the logic of these arguments by contending that 61 members of the A–1 Plus category at the time that he was dismissed[8] were marked "no efficiency." This, he assumes, means an efficiency less than "good," and hence that they should have been placed in subgroup A–3, a category below A–2 (the petitioner's group) and thus dismissed before him. This argument, however, is unfounded. At the Charleston Navy Yard, it had been customary to give efficiency ratings every six months. The persons who were marked "no efficiency" had not been there sufficiently long to be rated in the normal

[8] The particular A–1 plus retention group to which petitioner addresses his entire argument in this phase of the case are shipfitters (R. 25–28). There was, in fact, no A–1 plus retention group among the leadingmen shipfitters (R. 20–21).

course, and it was not believed necessary that they be rated other than in normal course, because, owing to their A–1 Plus classification, they were entitled to retention for a period of one year. Had it been deemed necessary or desirable, they would doubtless have been given a provisional rating of "good" or their last official rating as is now required in all such cases. Federal Personnel Manual, Chapter E 1, p. 5, November 24, 1947, March 2, 1948. It is significant, moreover, that of these 61 men, 60 are now in group A–1 with an efficiency rating of "good" or better, and that the 61st man resigned from the service before he received any rating.[9] Accordingly, all who originally constituted the A–1 Plus group are now in the A–1 group with efficiency ratings of "good" or better, and any order of the District Court which sought to restore petitioner to his former position would have to hold that he was entitled to displace one of these men. This, we

[9] It is, of course, obvious that the men in the A–1 Plus subgroup at the time petitioner filed his complaint (November 19, 1946) must have been transferred to some other subgroup as A–1 Plus is a subgroup in which a veteran can remain only for a year. We thought it important that the Court be advised of the present situation and accordingly asked the Secretary of the Navy for information as to what had happened to the men who were in A–1 Plus at the time the complaint was filed, and as to what the present situation is. (See Appendix C, *infra*, pp. 66–68.) There is set forth in Appendix C, *infra*, pp. 68–70, a letter from the Secretary of the Navy, written in response to this inquiry, which sets forth the facts in respect to the shipfitter group at the Charleston Navy Yard at the present time.

submit, cannot be done unless petitioner can show that the A–1 group has no support in law.[10]

We do not understand petitioner now to contend that he is entitled forthwith to restoration to his former job, but that his present position is that, should this Court hold that subgroups A–1 plus and A–1 are invalid, the case should be returned to the District Court with instructions to that court to withhold its "mandate" until new regulations are promulgated (Pet. Br. pp. 79–80). It thus appears that petitioner accepts as a fact that the vital issue in this case is the validity of the regulation granting absolute priority in retention to veterans with a "good" or better efficiency rating.

We accordingly submit that if the regulation establishing subgroup A–1 is held to be valid, petitioner is entitled to no relief. It is only in the event that subgroup A–1 is held invalid that the question of the validity of subgroup A–1 Plus could be reached, and even then it is not clear that its existence would affect petitioner's reemployment rights, as he doubtless has retention credits in excess of many veterans in the shipfitting department presently classified A–1.

[10] We are advised that at the present time there are 11 men in the A–1 plus category of shipfitters at the Charleston Navy Yard, all of whom, pursuant to present regulations, have an efficiency rating, and that the efficiency ratings of these men are all "good" or better. There are now no non-veterans in the shipfitters' department.

I

THE REGULATION OF THE CIVIL SERVICE COMMISSION ESTABLISHING SUBGROUP A-1 IS VALID

It is well settled that petitioner has no general and undefined right to retention in government service solely by virtue of his civil service status. While Congress may limit and restrict the power of removal (*United States* v. *Perkins,* 116 U. S. 483, 485), the normal rule is that, absent any express contrary provision, the power of removal is an incident of, and follows, the power of appointment. *Parsons* v. *United States,* 167 U. S. 324; see *Blake* v. *United States,* 103 U. S. 227, 231; *Keim* v. *United States,* 177 U. S. 290, 293–294; *Burnap* v. *United States,* 252 U. S. 512, 515; *Wallace* v. *United States,* 257 U. S. 541, 544; *Myers* v. *United States,* 272 U. S. 52, 160–161; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 629. Such right as petitioner may have to retention in the government service therefore must be a right which is specifically conferred by statute.

The controlling statute which here restricts the exercise of the removal power vested in an appointing officer is Section 12 of the Veterans' Preference Act of 1944, *infra,* pp. 58–59, which alone applies when reductions of personnel become necessary because of lack of funds or lack of work. This is clear since the basic Civil Service Act of January 16, 1883, c. 27, 22 Stat. 403, as amended, c. 522, 50 Stat. 533 (5 U. S. C. 632 *et seq.*), con-

tains no reference to removal except for a general prohibition against removals for political reasons or on account of marital status. That Act is concerned principally with the method of exercising the power of appointment and is silent as to the status and rights of employees once appointed. The Act of August 24, 1912, c. 389, 37 Stat. 539, 555, Sec. 6 (5 U. S. C. 652), which provides for the preferring of charges and opportunity to answer in the case of removals, is addressed to removals "for cause" and is not applicable to removals necessitated by an administrative exigency not personal to the employees, such as removals because of lack of work or lack of funds. Cf. *Stilling* v. *United States*, 41 C. Cls. 61, 66; *Brown* v. *United States*, 39 C. Cls. 255, 256–257. *Wheelock* v. *United States*, 46 C. Cls. 1, 5.

Any rights which petitioner may have to retention in government service, therefore, must be based squarely on Section 12 of the Veterans' Preference Act and the regulations promulgated pursuant thereto. It is our contention that the regulation of the Civil Service Commission, establishing subgroup A–1 which grants an absolute retention preference over nonveterans to veterans with a rating of "good" or better, was required by the second proviso to Section 12, or that, in any event, it was a permissible exercise of the authority to promulgate regulations entrusted by Congress to the Commission.[10a] This

[10a] Petitioner contends (Br. p. 30), that the regulations in the A–1 group were adopted by the Commission in the mis-

we think follows not only from the plain language of Section 12, but also from the history of the preferences which have been extended to veterans of the armed services for over seventy years and which established a pattern of veteran preferences, and from the legislative history of the Veterans' Preference Act which clearly discloses that it was the intent of Congress to retain an absolute retention priority for veterans.

1. *Prior legislative and executive action has established a pattern for preferences in retention of veterans over nonveterans*

It has been the settled policy of the United States for a period of over 70 years to extend benefits with respect to employment and retention in government service to those who have served in its armed forces. Retention preference [11] was first

taken belief that they were required by law and that they should be set aside with directions to the Commission to formulate new ones, based exclusively upon its informed discretion. The short answer is that petitioner has not proved his premise, and there is nothing to show that the Commission formulated the present regulations in the belief that no other course was open to it. Compare subgroup A–1 Plus where the regulation recites that it was required by law although it now appears that the Commission retains it as a matter of discretion (see *inf*., pp. 50–51). Arguments by counsel for respondents in briefs or otherwise that the statute requires the preference in retention does not make the adoption of the regulations in question involuntary on the part of the Commission. Compare *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, 241.

[11] Employment preference to disabled veterans was first granted by the Act of March 3, 1865, Res. 29 (13 Stat. 571)

granted veterans by the Act of August 15, 1876, c. 287, § 3, 19 Stat. 143, 169, 5 U. S. C. 37, which provided in part as follows:

> * * * In making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.

This legislative policy was broadened and affirmed by the Act of August 23, 1912, c. 350, § 4 (37 Stat. 360, 413), which contained the following proviso:

> * * * in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.[12]

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and was reaffirmed by Section 7 of the Civil Service Act of 1883, 22 Stat. 403, 406 (5 U. S. C. 638). Subsequent enactments show a continuing legislative policy to grant employment preference to honorably discharged veterans. See Act of March 3, 1919, c. 97, § 6 (40 Stat. 1293) as amended July 11, 1919, c. 6, § 1 (41 Stat. 37). Cf. Act of June 18, 1929, c. 28, § 3, 46 Stat. 21 (5 U. S. C. 35).

[12] Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555 (5 U. S. C. 652), which provides that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service" must be read in the light of this section. See *United States* v. *Burnet*, 65 F. 2d 195, 196–197 (App. D. C.).

Although the foregoing statutes did not provide a centralized authority for administration,[13] they clearly constituted an unconditional Congressional mandate to the executive branch to accord veterans absolute retention preference over non-veterans, without regard to relative length of service and subject only to the requirement of a good efficiency rating.

Subsequent executive orders and regulations implemented and expanded the legislative policy established by the foregoing statutes. Pursuant to Section 4 of the Act of August 23, 1912, *supra*, the President, by Executive Order 3567 of October 24, 1921, directed that, in the event of demotions and dismissals of personnel in the classified departmental service, "honorably discharged soldiers and sailors whose ratings are good shall be given preference in selecting employees for retention."[14] On March 3, 1923, retention preference was extended to veterans in the field service by

[13] Authority to enforce the regulations with respect to retention in government service was finally centralized in the Civil Service Commission by Executive Order 9063 of February 16, 1942 (7 Fed. Reg. 1075).

[14] Section 7 of Executive Order 3567 provided in part: "* * * In cases of reductions in the number of employees on account of insufficient funds or otherwise, necessary demotions and dismissals shall be made in order, beginning with the employees having the lowest ratings in each class, but honorably discharged soldiers and sailors whose ratings are good shall be given preference in selecting employees for retention."

Executive Order 3801,[15] and in 1936, by order of the President, to government positions not under civil service.[16] While length of service was given limited recognition for retention purposes for the first time by Executive Order 4240 of June 4, 1925,[17] that order reaffirmed the policy of granting abso-

[15] Executive Order 3801 amended Civil Service Rule XII by the addition of Paragraph 5. It read in part, as follows: "5. In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good."

[16] Departmental Circular 146, U. S. Civil Service Commission, October 22, 1936.

[17] Executive Order 4240 provided in part as follows:

"EMPLOYEES ELIGIBLE FOR MILITARY PREFERENCE

"1. Executive order of March 3, 1923, will be construed to require that in selecting employees to be demoted or separated on account of any reduction of working forces honorably discharged soldiers, sailors, and marines, and the widows of such, and the wives of injured soldiers, sailors, and marines, who themselves are not qualified for positions in the Government service, will be placed at the top of the lists of competing employees, in the order of their ratings, provided they attained for the last rating period an efficiency rating of not less than 80; and they will be retained in existing status, if their record in respect to deportment, attitude and attendance is satisfactory, in preference to all other persons with whom they are respectively in competition.

"EMPLOYEES NOT ENTITLED TO MILITARY PREFERENCE

"2. When preparing lists from which to select employees for demotion or separation on account of reduction of force, credits for length of service will be added to all efficiency ratings of 85 or higher, as follows:

"0.1 for the first full year of Government service.

lute retention preference to veterans with "good" or better efficiency ratings. Only as against veterans with efficiency ratings lower than "good" were nonveterans given retention rights by reason of greater length of service. This limited recognition of length of service was further narrowed by

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"0.2 for the second full year of Government service.
"0.3 for the third full year of Government service.
"0.4 for the fourth full year of Government service.
"0.5 for the fifth full year of Government service.
"0.6 for the sixth full year of Government service.
"0.7 for the seventh full year of Government service.
"0.8 for the eighth full year of Government service.
"0.9 for the ninth full year of Government service.

and one point for each year thereafter, except that the maximum credit for length of service shall not exceed 25 points. The period of service shall be computed from the date of original employment, whether as a classified or unclassified employee in the civil service of the United States, and shall include periods of service at different times and services in one or more departments, branches, or independent offices of the Government, and shall also include service performed under authority of the United States beyond seas, and honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States: *Provided:* That all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be excluded. Credit will not be given for service rendered beyond retirement age. For example, an employee with 10 years of service, whose efficiency rating was 70, would receive a demotion or separation rating of 75.5 while one with 30 years or more of service and a rating of 70 would receive a demotion or separation rating of 95. Demotions and separations from each class heretofore or hereafter established by the Personnel Classification Board will be made in order beginning with the employee having the lowest rating, except that an employee with a higher rating may be demoted

Executive Order 5068 of March 2, 1929,[18] which provided that, where the efficiency ratings of both veteran and nonveteran were equal, but both were less than good, the veteran had an absolute retention preference irrespective of length of service.

Finally, it is of great significance that the reduction-in-force regulations which the Commission promulgated on July 31, 1943,[19] and which remained in effect for almost a year immediately prior to enactment of the Veterans' Preference Act of 1944, gave effect to military preference and length of service in the same manner as the present regulations. Specifically, the 1943 regulations gave retention preference, "as between

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or separated in preference to another with a lower rating if the duties of the position to be retained cannot be acceptably performed by the employee with the higher rating after a reasonable preliminary training period. Honorably discharged soldiers, sailors, marines, and widows of such, and the wives of injured soldiers, sailors, and marines, who are not qualified for positions in the Government service, whose efficiency ratings are below 80 and therefore are not entitled to military preference, will, after having received services credits to which they are entitled, compete with other employees not entitled to military preference."

[18] Executive Order 5068 amended paragraph 5 of Civil Service Rule XII (see note 15, *supra*, p. 26) as follows:

"5. In harmony with statutory provisions, when reductions are being made in force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good, *or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.*" (Italics supplied.)

[19] 5 C. F. R., 1943 Supp., 12.301–12.313.

permanent employees in each grade, to (a) veterans with efficiency ratings of "Good" or better over non-veterans with ratings of "Good" or better, and (b) veterans with "Fair" efficiency ratings over non-veterans with "Fair" efficiency ratings. As in the present regulations, length of service and high efficiency ratings were reflected in retention credits which determined the order of release within each category. It is this treatment of military preference and length of service which Commissioner Flemming referred to when he told the Senate Committee on Civil Service, apropos of the first clause of Section 12, that "our existing reduction-in-force regulations are in harmony with that."[20] In brief, Congress was informed that under Section 12 the Commission would continue to give effect to the factors of military preference and length of service in the same manner as it had done in the existing regulations adopted in 1943. Here too, is the true explanation of the Commission's objection to Section 12 as originally drafted to require release of employees in the inverse order of total Federal service (including military service), on the ground that consideration should be given to the relative efficiency of employees. In the light of the 1943 regulations, it is perfectly clear that the Commission was only concerned that the original draft

[20] Hearings, Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. (1944) 27.

would preclude it from giving preference to nonveterans with "Good" efficiency ratings over veterans with lower ratings and from giving any retention credits for efficiency. Cf. Pet. Br. 50–54.

From the foregoing it is clear that, from 1876 until the enactment of the Veterans' Preference Act of 1944, the Government had followed a continuous policy of granting to veterans with "good" or higher efficiency ratings absolute preference in retention in employment over nonveterans without regard to length of service.

2. *The legislative history of the Veterans' Preference Act reveals a clear purpose to preserve all preference rights theretofore conferred upon veterans*

The legislative history of the Veterans' Preference Act[21] clearly establishes a Congressional

[21] H. R. 4115 was introduced on February 3, 1944 (90 Cong. Rec. 1233), and was referred to the Committee on Civil Service. The bill was favorably reported to the House on March 27, 1944 (90 Cong. Rec. 3156; H. Rep. No. 1289, 78th Cong., 2d sess.), and passed the House on April 17, 1944, after a short discussion. 90 Cong. Rec. 3501–3507. A companion bill, S. 1762, was introduced into the Senate on March 9, 1944 (90 Cong. Rec. 2401), and hearings were held on both bills by the Senate Committee on Civil Service on May 19 and 23, 1944. Hearings before the Committee on Civil Service, U. S. Senate, on S. 1762 and H. R. 4115, 78th Cong., 2d sess. The bill was reported favorably to the Senate on May 25, 1944 (90 Cong. Rec. 4959; S. Rep. No. 907, 78th Cong., 2d sess.), and passed the Senate, as amended, without debate, on June 12, 1944. 90 Cong. Rec. 5785. The House concurred in the Senate amendments, without debate, on June 20, 1944. 90 Cong. Rec. 6283. The bill was approved on June 27, 1944. 90 Cong. Rec. 6712.

intention to consolidate and codify in one statute the several preferences available to veterans with respect to government employment, including the long established policy of according veterans absolute retention preference without regard to length of service. S. Rep. 907, 78th Cong., 2d sess. p. 1; H. Rep. 1289, 78th Cong., 2d sess. p. 1; 90 Cong. Rec. 3502, 3503, 3505.[22] The Report of the House Committee on Civil Service, H. Rep. 1289, *supra*, pp. 2–3, contains the following general statement regarding the purpose of the bill:

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[22] The pre-existing statutory provisions granting preferences to veterans were:

(1) R. S. 1754, 5 U. S. C. 35 (from Section 1 of the Act of March 3, 1865, 13 Stat. 571): preference in appointments for veterans discharged for service-connected disability.

(2) Section 3 of the Act of August 15, 1876, 19 Stat. 143, 169, 5 U. S. C. 37: preference in reduction-in-force to "those persons * * * who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

(3) Section 4 of the Act of August 23, 1912, 37 Stat. 360, 413: preference in reduction-in-force to "honorably discharged soldier or sailor."

(4) Section 6 of the Act of March 3, 1919, 40 Stat. 1291, 1293, as amended by the Act of July 11, 1919, 41 Stat. 35, 37, 5 U. S. C. 35: preference in appointments to "honorably discharged soldiers, sailors, and marines, and widows of such and to the wives of injured soldiers, sailors and marines who themselves are not qualified, but whose wives are qualified to hold such positions."

(5) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 5 U. S. C. 35: same as the 1919 provision.

(6) Section 3 of the Act of June 18, 1929, 46 Stat. 21, 13 U. S. C. 203: Preference in *census* appointments to war disabled servicemen, to their widows, and to the wives of such husbands not qualified for such positions.

It has been the policy of the United States Government since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed services during wartime. Since shortly after the Civil War, the Congress has provided in various statutes for different forms of preference in governmental employment to war veterans. These statutes have usually been in broad, general terms, and have been applied under Executive orders and regulations promulgated by the President.

For a number of years proposals have been introduced in Congress to codify or establish by statute veterans' preference in governmental employment. Your committee has conducted public hearings on this subject at least three times within the past few years. This bill is an attempt to meet the requirements of such an act. Careful consideration has been given to its provisions in the light of past legislation and practices. * * *

* * * The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions.

The debates in Congress (90 Cong. Rec. 3502, 3503, 3505) and the public hearings before the

Senate Committee on Civil Service (Hearings before the Committee on Civil Service, United States Senate, 78th Cong., 2d sess., on S. 1762 and H. R. 4115, pp. 8, 27) give further evidence that it was the intention of Congress to continue in effect the substance of the statutes, and to give legislative status to the several executive orders and regulations (see pp. 24–30, *supra*) which accorded veterans' preference in government employment. They clearly indicate that it was not the intention of Congress to deprive veterans of any of their then existing preferences, including the preference in retention without regard to length of service for which the 1912 act had provided.[23] But we need not

[23] In the debates in the House of Representatives Mr. Starnes of Alabama, one of the principal sponsors of the bill stated (90 Cong. Rec. 3502):

"Most of the provisions of this particular bill have been in practice for a number of years. Since World War No. 1 various Executive and administrative orders have extended to veterans throughout this country privileges in Government services. However, it is a matter of regret to me that the Congress has not heretofore established by law preference to veterans in Government employment. This is the first step in that direction. We are laying down a broad, general policy, and in some instances we are being quite specific in this bill in providing preference for veterans in Government. * * *"

Mr. Rees of Kansas commented on the bill as follows (90 Cong. Rec. 3503–3504):

"Mr. Speaker, the bill under consideration, H. R. 4155 [sic], and known as the veterans' preference bill, continues the law and Executive orders that have been in effect for a number of years providing for veterans' preference in governmental employment. * * * The bill, as I have sug-

rely upon such negative evidence, for nothing could be more explicit than Civil Service Commissioner Flemming's explanation of Section 12 to the Senate Committee (Senate Hearings p. 27); after quoting the second proviso, he stated:

> That proviso is substantially the same as a law passed by Congress in 1912, which

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gested at the beginning, strengthens and improves veterans' legislation heretofore passed by Congress."

Mr. Ramspeck of Georgia stated (90 Cong. Rec. 3505): "It is true, Mr. Speaker, this act does not make a great many changes in the present veterans' preference, which exists largely by Executive order, but it is important, I think, that those Executive orders be given legislative status by the Congress.

"It does give some additional strength to the veterans' preference, by strengthening the Executive orders now in existence. * * *"

During the hearings before the Senate Committee on Civil Service, Mr. Starnes again stated (Hearings before the Committee on Civil Service, United States Senate, *supra*, p. 8):

"H. R. 4115 is the result of years of work by the major veterans' organizations of the country and the Civil Service Commission and the author of the bill. * * * It is the desire of the veterans' organizations that the existing Executive orders and administrative orders giving veterans preference should be adopted by the Congress of the United States as a national policy and thus give them the sanctity of legislative approval. * * * What it does is to give legislative sanction to existing veterans' preference, to the rules and regulations of the executive branch of the Government, and to broaden and strengthen those preferences * * *. There are some new provisions contained in this bill. I just want to say briefly that this bill takes away no existing veterans' preference either by statute or Executive order, but it does strengthen, broaden, and implements the veterans' preference policy heretofore in effect."

was interpreted to apply to only the departmental service. By Executive order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal service, so that the last proviso simply continues what has been in practice throughout the entire Federal service since 1923.

In the light of these sweeping assurances that the proposed Act was intended to codify existing veterans' preferences and to subtract nothing therefrom, we submit that there exists a clearly established legislative intent to continue to accord to veterans with efficiency ratings of "good" or better preference in retention over nonveterans irrespective of the latters' length of service.

3. *The second proviso to Section 12 of the Act is an explicit command that in the event of a reduction in force there must be given to veterans with an efficiency rating of good or better an absolute retention preference over competing non-veterans, irrespective of length of service*

It is in the setting afforded by the long continued policy of the Government to grant an absolute preference in retention to a veteran with an efficiency rating of "good" or better, over a competing nonveteran, and the proclaimed policy of Congress in enacting the Veterans' Preference Act to codify and expand but not to sub-

tract from veterans' preferences, that the second proviso to Section 12 must be applied. It reads:

> *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *.

This language is precise, and in many aspects resembles that employed in prior retention statutes and executive orders. It commands the retention of a veteran with a "good" (or higher) efficiency rating in preference to all competing employees. Cf. *Kirkman* v. *MacMorland, et al.*, 71 F. Supp. 15, 20 (E. D. Pa.). In effect, this proviso [24] is an affirmance of the Congressional policy first announced in Section 4 of the Act of August 23, 1912, *supra*, pp. 24–25, as implemented by Executive Orders 3567, 3801, and 4240, *supra*, pp. 25–28. The regulations of the Commission, correctly, we submit, have given this proviso the normal interpretation that it withdraws from what might otherwise be the restrictive part of an act, the group or class named in the proviso.

[24] By the second clause, this proviso, which grants preference employees with a less than good efficiency rating retention preference over competing nonpreference employees with equal or lower efficiency ratings, gives legislative status to Executive Order 5068, *supra*, p. 28.

Petitioner's entire argument is in essence an attempt to interpret "all other competing employees" as meaning only those competing employees who have equal or less service than the preference eligible, and would read that language into the proviso. The short answer is that Congress did not see fit so to write the Act. Such an interpretation not only reads into the statute a qualification which is not warranted by its language but, in practical effect, would largely nullify the preference which the proviso was intended to effectuate. It fails to give the word "all" its usual significance, which would normally comprehend competing employees, irrespective of length of service; it would place preference eligibles who are not veterans themselves (e. g., widow of a veteran) and who thus have no military service to count toward length of service at a ruinous disadvantage; and it would limit the benefits which the Act confers on a veteran to a slight weighting of his efficiency rating. We submit that petitioner's construction of the proviso does violence to its plain language and the legislative intent. It should be rejected.

Moreover, the administrative practice immediately prior to the 1944 Act, is fatal to petitioner's attempt to rewrite the Act. In its present regulations, the Commission has provided for the application of the retention preferences to the employees in a particular competitive level. Sec-

tion 12.302 (j) of the regulations provides that "'competitive level' means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible." Under this definition, for example, a P–1 attorney who is a veteran is not regarded as being in competition with a P–8 nonveteran attorney with entirely different responsibilities. This is the normal meaning of "competing employees", rather than to equate competition to the number of years an employee has been in the same grade. Very persuasive evidence that the Commission's application of the term "competing employees" reflects the Congressional purpose, lies in the fact that the Commission's Reduction In Force regulations which were in effect prior to the Veterans' Preference Act of 1944, employed the same concept.[25] By enacting the 1944 statute, without defining "competing employees", Congress must be presumed to approve the existing administrative definition

[25] These regulations were issued on July 31, 1943, 5 C. F. R., 1943 Supp., 12.301–12.313. Section 12.303 provided, in part, as follows:

"* * * Within the determined organization unit, the class in which the contemplated reduction in force is to be made shall include all positions allocated to the same class, service, and grade, and all positions of the same grade (although designated by another title) that are sufficiently alike that intertransfer of personnel is feasible. In ungraded positions, the class shall include all positions in an occupational level."

and practice of *not* using length of service to determine which employees should be regarded as competitive with each other.

4. *The establishment of subgroup A–1 is valid as a reasonable exercise of the Commission's authority to prescribe regulations*

This subdivision of our argument is reached only if the Court perceives an ambiguity in the second proviso to Section 12 which is not apparent to us. But assuming, arguendo, that the second proviso does not have the force which we ascribe to it, we submit that the regulations in question are sustainable as valid and proper exercises of the power conferred upon the Commission to issue regulations, and conform substantially to the standards laid down in the first paragraph of Section 12.

Section 12 contains a general command that in reductions of personnel in the governmental civilian service, competing employees shall be released in accordance with the regulations of the Civil Service Commission which shall give "due effect" to four factors: "tenure of employment, military preference, length of service, and efficiency ratings." An examination of the challenged regulations reveals that the Commission has followed this statutory mandate, and that petitioner's contention that they give no effect to "length of service" is wholly without merit.

The Commission's regulations require, first, the division of all competing employees according to their tenure of office. Permanent employees are thus given absolute retention preference irrespective of all other criteria, and petitioner apparently concedes the correctness of the regulations in this respect (Pet. 13). Second, the regulations give weight to efficiency ratings in computing retention credits. Petitioner does not challenge them in this respect. Thus, the only issue raised in this aspect of the case is whether, as between the two remaining statutory criteria, length of service and military preference, the Commission abused its discretion in giving greater weight to military preference. We submit that it did not.

Length of service is a variable factor, subject to gradations ranging from one day to fifty years or more. It affords a direct basis for comparison between competing employees and in the majority of cases is the controlling factor in determining retention priority between veteran and veteran and nonveteran and nonveteran. There are, however, no gradations of military preference for retention purposes; it is an absolute factor.[26] An employee is either entitled to it or

[26] Petitioner urges that Section 12 provides on its face the factors which shall be given reasonable effect in determining retention in civil service, and that in no circumstances can the regulations as issued be said to fall within these (Pet. 14). Then, apparently assuming his major premise, he argues that Congress could have meant to grant "absolute prefer-

he is not. Cf. *Mitchell* v. *Cohen*, Nos. 130–131, this Term, decided March 8, 1948. The problem raised, therefore, is the relative weight which should be given to these remaining factors in determining the issue of retention in the case of competition between a veteran and a nonveteran. The Commission's regulations resolve this issue in

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ence" only where it had specifically so provided. We agree with petitioner that the Act should be construed as a whole. However, we submit that his reference to the provisions of §§ 2 and 7, which deal with the entrance of personnel into government service, cannot be carried over into § 12, which deals with reduction in force. Section 2 is general in scope and defines the persons who shall be entitled to military preference in "certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions" in the various establishments of the Government. Section 3 specifies that in all examinations to determine qualifications *for entrance* into the service disabled exservicemen and women, the wives of disabled exservicemen who cannot themselves qualify, and their widows shall have ten points added to their earned ratings. Exservicemen and women who have served in any branch of the armed forces of the United States, during any war, or in any campaign or expedition for which a campaign badge has been authorized, and have been honorably discharged, are entitled to have five points added to their ratings. Section 7 provides that the names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings (as provided by Section 3), ahead of all others having the same rating. This clearly refers only to *entrance* registers and lists and could have no possible bearing on *retention* registers. Even assuming that Section 7 applies to Section 12 by analogy, there is no basis for petitioner's argument. Section 7 and Section 12 are similar in structure. Section 7, as previously stated, first specifies the manner in which the

favor of the veteran, thus giving a content to the term "military preference" drawn from prior statutes, executive orders and its own regulations. This decision was clearly within the Commission's competence, both under the wide discretion vested in it by Section 12 to give "due effect" to all four statutory factors and in view of the long established policy of the Government with respect to granting veterans retention preference. See pp. 24–30, *supra*.

Petitioner seeks a result which, in the case of a competing veteran and nonveteran with identical tenure and efficiency ratings, would determine the issue of retention in favor of the nonveteran because of greater length of service. Under such a view, military preference would be an operative factor in determining the issue of retention only in the case where the veteran's length of service was identical with that of the nonveteran's. We submit that, had Congress intended any such

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names of all preference eligibles shall be entered on the appropriate appointment registers and lists of eligibles for entrance into the service. This procedure is then limited by a proviso to the effect that preference eligibles, except in the professional and scientific services, entitled to ten points (disabled exservicemen, their wives and widows) *shall be placed at the top of the appropriate register* in accordance with, that is, in the order of, their respective augmented ratings. Thus the proviso of Section 7 gives disabled exservicemen, their wives and widows, except in the professional and scientific service, an *absolute preference in entering federal service*, just as the second proviso of Section 12 gives preference eligibles with an efficiency rating of "good" or better an absolute preference in retention in federal service.

drastic change in existing law, it would have made its design patent and would not have left it to the inferences and intimations which petitioner purports to find in the Act.

It is clear, however, from the legislative history of the Act, that Congress considered the incorporation into Section 12 of such a provision and rejected it. Section 12 of H. R. 882, 78th Cong., 1st sess., the bill under consideration immediately prior to H. R. 4115, provided for the limited type of retention preference for which petitioner contends. It reads as follows:

> SECTION 12. In any reduction in personnel in any civilian service of any Federal agency employees within each classification to be reduced shall be released in the inverse order of the length of their total service: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing total length of service. * * *.

In the uccessor bill, H. R. 4115, this section was deleted and the present language of Section 12 was substituted. It was explained to the Civil Service Committee of the Senate, which had the bill under consideration during the course of the public hearings, that this change would require the discharge of nonveteran career workers with many years service in preference to veterans with as little as one year in government employ. Hearings before the Committee on Civil Service,

United States Senate, *supra*, pp. 33–34.[27] Notwithstanding this explanation, Section 12 of the bill was enacted without change.[28]

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[27] Mr. Eliot Kaplan, Executive Secretary of the National Civil Service Reform League, in testifying before the Committee, stated:

"The third, I think you ought to give consideration to, and that is the matter of retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service.

"I have written a memorandum to the committee.

"Senator LANGER. I wonder if we could have it placed in the file? I am tremendously interested in it."

The pertinent portion of the memorandum mentioned, which was made part of the record, is as follows:

"We venture to suggest that the Starnes bill fails to impose certain minimum requirements that ought to be a part of any scheme of preference for veterans:

* * * * * *

"4. Retention in the service should be based, so far as practicable, on efficiency ratings and length of efficient service. The bill grants preferential status to all veterans, regardless of relative efficiency or length of service. A nonveteran of 25 years' service may have to be released to retain a veteran only 1 year in Government employ. This would destroy all hope of a career service based on merit and fitness and seriously affect the morale of the service as a whole."

[28] That the purpose of the substitution of the language of Section 12 of H. R. 882 for that of H. R. 4115 was to confer upon veterans preference in retention without regard to length of service is evidenced by a letter from the Civil Service Commission to the Chairman of the Committee on the Civil Service, House of Representatives, stating:

"SECTION 12. This section of H. R. 882 provided that in reductions of personnel, employees shall be released in the

Because of the established policy of the United States to grant absolute retention preference in government service to veterans with "good" or better efficiency ratings, a policy first expressed by Congress in the Act of August 15, 1876, *supra*, and implemented and expanded by subsequent statutes, executive orders and regulations, and in view of the fact that it was the avowed purpose of Congress, in enacting the Veterans' Preference Act, to codify in one statute all of the prior acts, executive orders and regulations, we submit that petitioner's argument to the effect that Congress could never have intended that nonveterans with long periods of government service should be released while veterans with substantially less government employment should be retained, is wholly without substance. Moreover, it is clear that the very construction for which petitioner contends, that military service should be given effect only in computing total length of service, was categorically rejected by Congress although the attention of Congress had been called to the fact that, as enacted, Section 12 would place nonveteran civil service employees at a considerable disadvantage in competing with veterans for retention. It follows, as the court below held, that the Commis-

inverse order of the length of their total Federal service. In accordance with the suggestion made in the Commission's letter of January 31, 1944, this section has been amended in H. R. 4115. * * *" (H. Rep. No. 1289 (to accompany H. R. 4115), 78th Congress, 2d sess., March 27, 1944, p. 6.)

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sion did not abuse its authority in adopting the challenged regulation.

II

SUBGROUP A–1 PLUS IS BOTH WARRANTED AND REQUIRED BY SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT, AND THE COMMISSION'S REGULATION RECOGNIZING THAT FACT IS VALID UNDER SECTION 12 OF THE VETERANS' PREFERENCE ACT

As we have shown above (pp. 17–21), petitioner is not entitled to a declaratory judgment as to the validity of subgroup A–1 Plus unless it be established that subgroup A–1 is invalid and, even in that event, he has made no showing that he is entitled to a declaration as to the invalidity of subgroup A–1 Plus. Owing to the limited nature of that category (which comprehends veterans of World War II after release from the armed services) and the short tenure assigned to a veteran in that subgroup (one year), it is extremely unlikely that his employment rights would be affected by the existence of that subgroup in the future. It would only assume significance to a person who, unlike petitioner, had a low retention credit.

The validity of subgroup A–1 Plus is not, however, in our view open to serious question. Section 8 (b) (A) of the Selective Training and Service Act provides that a person who, in order to perform training and service under the Act, has left a position and who upon the completion of his service is still qualified to perform

the duties of such position and who makes application for reemployment, shall, if such employment was in the employ of the United States Government, be restored to such position or to a position of like seniority, status, and pay. Section 8 (c) of the Act provides that anyone restored to a position in accordance with the provisions of paragraph (A) "shall not be discharged from such position without cause within one year after such restoration." The directive to reemploy is mandatory and the prohibition against discharge is unconditional. This Act was not one of the group purportedly changed by the Veterans' Preference Act of 1944, and so remains in full force and effect. H. Rep. 1289, 78th Cong., 2d Sess. (1944), p. 7. It seems clear beyond dispute that when the Commission was establishing regulations setting up retention subgroups, it was compelled to recognize the existence of the statutory reemployment rights of returning veterans for one year and to establish an appropriate category for them. The creation of subgroup A–1 Plus was an appropriate response thereto.

Petitioner, however, contends that the decision of this Court in *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275,[29] holds that the restoration to a former position is not required by Section 8 (b) of the Selective Training and Service Act where it would re-

[29] He also relies upon dicta in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40.

quire the displacement of an individual having greater seniority than the returning veteran. But the *Fishgold* case dealt only with situations where the veteran had returned to private employment and where there was involved a union contract providing that furloughs or separations from the service of the employer were to be effected in the order of seniority when a reduction in force occurred. Even then, this Court did no more in the *Fishgold* case than hold that a short furlough pursuant to the terms of the union seniority contract did not constitute a discharge within the meaning of Section 8 (c) of the Act. Neither that case nor the *Whirls* case purports to deal with the situation where the employer was the United States and where the incidents of seniority were fixed not by any union contract but by statute, or by appropriate regulations of the Civil Service Commission. The Attorney General in an opinion dealing with this precise problem has construed the decision in the *Fishgold* case as having no impact upon the regulation establishing the A-1 Plus category. 40 Op. A. G. No. 115 (September 20, 1946). The *Whirls* case is, of course, even more remote from the question involved because there the year of reemployment accorded the veteran by Section 8 had already expired.

That Section 8 of the Selective Training and Service Act was intended to secure to a returning veteran the right of absolute reemployment seems

clear from the difference in language used in Section 8 (b) (A) and Section 8 (b) (B). In the case of the Government the duty to reemploy was absolute. This obligation the Government could impose upon itself without any qualification because it was the employer. In so far as the private or nongovernmental employer was concerned, the reemployment obligation was qualified to the extent that no obligation to reemploy was imposed upon him if he could show that his "circumstances have so changed as to make it impossible or unreasonable to do so."

Moreover, in view of the widespread interest in the manner in which the Executive Branch of the Government is enforcing the various statutes which have been enacted for the benefit of veterans, Congress is undoubtedly aware of the retention priority accorded returning veterans pursuant to Section 8 of the Selective Training and Service Act. Not only in its published regulations, but also in its Annual Report for 1945 (p. 25) the Commission has publicized the one-year retention preference embodied in subgroup A-1 Plus. Yet Congress has made no effort to change the administrative policy, which has been to accord a full year's employment to a returning veteran irrespective of the fact that such retention may cause the displacement of persons with greater seniority, including veterans as well as nonveterans. It is almost two years since the *Fishgold* case was decided by this Court and, while

we recognize that inaction by Congress cannot always be taken to be an approval of an administrative interpretation of one of its laws, we submit that, in the peculiar circumstances surrounding the reemployment rights of returning veterans, it here should be accorded great weight.

Petitioner finally contends that notwithstanding all the foregoing, the regulations establishing subgroup A–1 Plus should be set aside because the Commission erroneously concluded that it was required by law to establish that particular category, and that it did not do so in the exercise of its informed discretion. To this we submit there are two short answers: The first is that the establishment of that category or one similar to it is probably required by law, and the second is that it is not established that the Commission has retained that category in the belief that it is under a legal compulsion so to do. While it may be conceded that at the time of its original adoption, the Commission felt that it was under legal compulsion to set up that category, and indeed so recited in its regulation, nevertheless following the *Fishgold* decision, the Commission reexamined the problem. It requested and obtained an opinion of the Attorney General (40 Op. A. G. No. 115) and thereupon advised all agencies and departments that the regulation would stand unchanged. In Departmental Circular No. 556, Supplement No. 2 of November 1, 1946, it stated its interpretation of the Attorney General's opinion in the following

language: "2. The Attorney General is of the opinion that 'the regulations of the Civil Service Commission establishing the A–1 Plus retention preference are, * * * valid and designed to effectuate the provisions of section 8' (of the Selective Training and Service Act of 1940)." Thus, the Commission interpreted the Attorney General's opinion as holding that its regulations in so far as the A–1 Plus subgroup was concerned were appropriate, but certainly not mandatory. This is strengthened by the third paragraph of the Circular No. 556, which states: "In view of this opinion, the Commission does not propose to make any change in the retention-preference regulations as a result of the decision of the Supreme Court." This, we submit, rather clearly reflects a judgment independently arrived at, and not one which is compelled by law.

In the light of the foregoing, we submit that while it is unnecessary for this Court to pass upon the validity of subgroup A–1 Plus, nevertheless it is valid and the regulation of the Civil Service Commission establishing it was a permissible and proper exercise of the regulatory power conferred upon the Commission.

III

THE RELIEF WHICH PETITIONER SEEKS IS A LEGISLATIVE AND NOT A JUDICIAL MATTER

Petitioner's whole case resolves itself into the simple proposition that this Court should set aside

Civil Service Commission regulations embodying the express policy which the Government has followed for over seventy years with respect to granting retention preference to veterans. Petitioner's real complaint, and one which is understandable from his viewpoint, is directed against the legislative policy of granting substantial, rather than superficial, retention benefits to veterans. This is evidenced both by his complaint with its supporting affidavit and by his brief in which he reiterates the hardship to which he is being exposed and the deleterious effect on the public service which the Commission's regulations will have. He also, by a series of inferences and intimations, reaches a conclusion as to the statutory mandate which differs from that adopted by the Commission and urges that his interpretation should be adopted by the courts and thus should govern the Commission in promulgating regulations. The judicial relief which he seeks is not only opposed to the clearly demonstrated legislative intent (see *supra*, pp. 30–35), but is one which if granted would substitute the judicial process for the informed administrative process entrusted to the Commission by the statute. We submit that any relief which he obtains must be afforded by Congress.

Wide discretion in the adoption of regulations was conferred by the Veterans' Preference Act upon the Commission. Certain standards were prescribed but these in turn were not spelled out in

detail and were also subject to previous and other legislation.[30] It was a field in which the Civil Service Commission was through long experience peculiarly equipped to act. It is well settled that the interpretation of a statute by the agency of the Government charged with its administration is entitled to great weight in the courts. See *Billings* v. *Truesdell*, 321 U. S. 542, 548; *Gray* v. *Powell*, 314 U. S. 402, 412–413; *United States* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534, 549; *United States* v. *Jackson*, 280 U. S. 183, 193. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Lucas* v. *American Code Co.*, 280 U. S. 445. In the instant case, the Civil Service Commission has interpreted the Veterans' Preference Act, particularly Section 12, as granting to veterans a retention priority over non-veterans without regard to length of service. Such an interpretation, as we indicated, *supra*,

[30] Petitioner cannot successfully assert that the Civil Service Commission was not a proper administrative body to which to entrust the enforcement of the Act. The Civil Service Commission is sensible of the role which a sound and stable career service plays in our Government and its sixty-four years of existence are a history of unremitting effort to strengthen and enlarge the merit system. The granting of preference in employment to men and women who have served faithfully in the armed forces is also a well-established legislative policy of even longer standing than the Civil Service Act. The Commission's duty as an arm of the Executive Branch of the Government is to effectuate the legislative policy enunciated in these statutes, as well as the policy implicit in the Civil Service Act.

pp. 23–30, merely expresses a well-established policy of long standing. The regulations which were promulgated pursuant to this interpretation conform to the statutory mandate, and there exists no grounds for their modification by this Court. Cf. *United States* v. *Philbrick,* 120 U. S. 52, 59; *United States* v. *Hill,* 120 U. S. 169, 182; *Robertson* v. *Downing,* 127 U. S. 607, 613; *United States* v. *Chicago North Shore R. Co.,* 288 U. S. 1, 13; *New York, C. & St. L. R. Co.* v. *Frank,* 314 U. S. 360, 372–373.

We do not attempt to minimize the loss sustained by a nonveteran in being separated from government employment after many years of faithful service in order to make way for veterans who are his juniors in service. That, however, is a hardship which can be relieved by Congress alone. And Congress is cognizant of the fact that nonveterans with many years of service are being discharged as a result of the operation of Section 12 of the Act.[31] However, it has not seen fit to enact any amendment to the Act.[32] And that, we submit, is the only manner in which petitioner can obtain relief, for the regulations of the Commission, as a result of which he was separated from government service, find adequate support in the statute.

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[31] The Act of August 8, 1946, 60 Stat. 939, granted special pensions to employees over fifty-five years of age who are involuntarily separated in reduction of force after twenty-five years of service.

CONCLUSION

For the reasons stated, the decision below should be affirmed.

Respectfully submitted.

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APRIL 1948.

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[32] A bill now pending, S. 2327, 80th Cong., 2d sess., would amend Section 12 to read:

"SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees with less than ten years of total service and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees with less than ten years of total service who have equal or lower efficiency ratings: * * *"

APPENDIX A

The Veterans' Preference Act of June 27, 1944, c. 287, 58 Stat. 387 (5 U. S. C., Supp. V, 851–869) provides in pertinent part as follows:

* * * * *

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who

served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 3. In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2 (1), (2), and (3), and five points shall be added to the earned ratings of those persons included under section 2 (4) of this Act: *Provided,* That in examinations for the positions of guards, elevator operators, messengers, and custodians competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available and during the present war and for a period of five years following the termination of the present war as proclaimed by the President or by a concurrent resolution of the Congress for such other positions as may from time to time be determined by the President.

* * * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the

same rating: *Provided*, That, except for positions in the professional and scientific services for which the entrance salary is over $3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in accordance with their respective augmented ratings.

* * * * *

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employ-

ment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

* * * * * *

SEC. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

* * * * * *

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885 (50 U. S. C. App. 301 *et seq.*) provides in pertinent part as follows:

* * * * * *

SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes

application for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

APPENDIX B

The pertinent retention regulations of the Civil Service Commission in force at the time petitioner was furloughed, 5 C. F. R. (1945 Supp.) 12.302 *et seq.*, as amended by 11 Fed. Reg. 8205, 9003, 9977, provide:

§ 12.302 *Definitions.*—For the purpose of §§ 12.301 to 12.314, inclusive, definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoration rights, or for other reasons. However, the term does not apply to (1) termination of temporary appointments limited to one year or less, (2) retirement of employees, or (3) separations for unsatisfactory service.

(b) "Retention groups" and "subgroups" means classes of employees entitled to the same degree of retention preference on the basis of tenure of employment and veteran preference.

(c) "Retention credits" are credits for length of service and efficiency ratings in determining retention order in each retention subgroup. They are computed by

allowing one point for each full year of Federal Government service plus five points for an "Excellent" efficiency rating, three points for a "Very Good" efficiency rating, and one point for a "Good" efficiency rating. This paragraph shall be effective with respect to notices in reductions in force issued on and after September 15, 1946, or, with respect to individual agencies, at any date prior thereto at the option of the agency: *Provided,* That, with respect to ungraded positions under the Navy Department this paragraph shall be effective on October 15, 1946.

(d) "Federal Government service" means the total of all periods of service eligible for consideration for civil service retirement purposes, without regard to whether the employee is eligible or will be eligible actually to receive retirement benefits. All active military service is counted whether or not veteran preference is given therefor or whether it is eligible to be considered for civil service retirement purposes. Total service shall consist only of full years of creditable service, but fractions of a year shall be considered in arriving at the total.

(e) "Efficiency rating" means (1) for employees paid under the compensation schedules of the Classification Act of 1923 as amended or of Executive Order No. 6746, the current official efficiency rating under the Uniform Efficiency Rating System; and (2) for other employees the current efficiency rating system which is in general compliance with the uniform system.

Administratively adopted efficiency rating systems not in general compliance with the uniform system may be used for de-

termining retention credits with the prior approval of the Commission.

(f) "Veteran preference employee" means an employee entitled to veteran preference under the Veterans' Preference Act of 1944.

(g) "Department" means an entire executive department, parent organization with constituent agencies, independent establishment, government-owned or government-controlled corporation of the Federal Government, the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the executive branch of the Federal Government created by Act of Congress or Executive order.

(h) "Governmental entity" means a department, bureau of a department, parent organization, constitutent agency, independent establishment, entire field installation, regional office, or field station, an operating department of the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the Federal Government created by Act of Congress or Executive order.

(i) "Competitive area" means a governmental entity, a combination of governmental entities, or that part of a governmental entity for which approval has been secured from the Commission, within which employees of a competitive level are considered to be in competition.

(j) "Competitive level" means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible.

§ 12.303. *Retention preference; classification.*—For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating less than "Good".

A–2 Without veteran preference unless efficiency rating is less than "Good".

A–3 With veteran preference where efficiency rating is less than "Good".

A–4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good".

B–2 Without veteran preference unless efficiency rating is less than "Good".

B–3 With veteran preference where efficiency rating is less than "Good".

B–4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good".

C–2 Without veteran preference unless efficiency rating is less than "Good".

C–3 With veteran preference where efficiency rating is less than "Good".

C–4 Without veteran preference where efficiency rating is less than "Good".

APPENDIX C

MARCH 29, 1948.

The Honorable JOHN L. SULLIVAN,
Secretary of the Navy, Washington, D. C.

Re: *Earle W. Hilton* v. *John L. Sullivan, et al.* In the Supreme Court of the United States, No. 560, October Term, 1947.

MY DEAR MR. SECRETARY: Petitioner, a non-veteran, instituted the above-captioned suit as an action for a declaratory judgment, mandamus and other relief, alleging that he had been unlawfully discharged from his position as leadingman shipfitter at the Charleston, South Carolina, Navy Yard. Petitioner had been placed in retention subgroup A–2 by the Commandant of the Yard, and was furloughed during a recent reduction in force. He attacks the validity of the Civil Service Regulations (5 C. F. R. 12.301 *et seq.*) and the Navy Department Regulations (NCPI 170, Rev. II, as amended) which were promulgated pursuant to the Veterans' Preference Act of 1944, alleging that the establishment of A–1 and A–1 plus retention subgroups was not required by law and constituted an abuse of administrative discretion on the part of the Civil Service Commission. He seeks reinstatement to his former position.

Among the points which petitioner urges is that 61 of the men listed in the A–1 plus group on the shipfitters retention register at the Charleston Navy Yard were listed as "no efficiency". He argues that these men had a "less than good"

efficiency rating and, accordingly, should have been placed in retention group A–3. From this he infers that, had they been so placed, he would not have been furloughed.[1]

I understand that, at the time involved (November, 1946) shipfitters, by regulation, were subject to receiving official efficiency ratings semi-annually, with the exception that if an official efficiency rating became necessary prior to the semi-annual date in order to determine the employee's rights, such as for pay increases or retention purposes, a "special" efficiency rating would be made. Pertinent reduction in force regulations provided that an efficiency rating was needed for determining retention credits only within a subgroup where some but not all of the employees were being reached for action such as demotion, furlough, or separation. As none of the A–1 plus shipfitters were being reached for such action, it was believed no efficiency ratings were needed for the 61 shipfitters in subgroup A–1 plus classified "no efficiency".

I understand further that all of the shipfitters in the A–1 plus subgroup, with the exception of one, listed "no efficiency" in November, 1946, were subsequently rated "good" (or better); that the one man who did not receive an efficiency rating because of the regulations then in force at the Yard had resigned; that at the present time there are no shipfitters at the Charleston Yard who are either in group A–1 plus or in A–2; and

[1] 57 of the men listed in the A–1 plus retention group were given efficiency ratings of "good" (or better) as were all of the men listed in the A–1 retention group. 23 men in the A–2 retention group were listed as either "A Non Vet. No. Efficiency" or "A–2 No Efficiency".

that, at present, all shipfitters at the Yard are listed in retention group A–1.

The record also discloses that 23 men were listed generally in group A–2 and rated no efficiency, but fails to suggest the reason for this rating. Also there seems to be some confusion in respect of this particular group. One subgroup is listed "A Non Vet. No Efficiency" and the other is listed as "A–2 No Efficiency". Information in respect of this group of 23 men would be helpful.

The information outlined above is requested so that we may be in a position to reply to the argument which petitioner has made. If my understanding is incorrect then we have a duty to the Court to explain why certain personnel rated "no efficiency" were placed above petitioner in the retention register at the Charleston Yard.

Sincerely yours,

For the Attorney General:

H. G. MORISON,
Assistant Attorney General.

THE SECRETARY OF THE NAVY
WASHINGTON

1 APRIL 1948.

Honorable TOM C. CLARK,
Attorney General of the United States,
Department of Justice, Washington, D. C.

Re: *Earle W. Hilton* v. *John L. Sullivan, et al.* In the Supreme Court of the United States, No. 560, October Term, 1947.

DEAR MR. CLARK: Reply is made to your letter of 29 March 1948 relative to the above-captioned matter.

In answer to your inquiry concerning the sixty-one employees who appeared on the retention register in the A–1 plus group listed "no efficiency", this group of restored veterans were listed in this manner because at the time the retention register was prepared (November 1946) Shipfitters were subject to receiving official efficiency ratings semi-annually and the group of sixty-one had not been on the rolls of the Shipyard subsequent to their return from military service at the time the regular official semi-annual efficiency rating marks were assigned. Accordingly, no efficiency rating marks appear on the retention register for these employees. You are correct in your understanding that subsequently all employees in this group were assigned efficiency ratings of "good" or better with the exception of one employee (Paul E. Pearce) who resigned prior to the date he would have received a rating.

Relative to your inquiry concerning the twenty-three employees in group A–2 who appear on the retention register "no efficiency", I am informed that the reason this group appears in this manner is due to the fact that these employees in the A–2 group also had not been in Shipfitter positions on the date when semi-annual ratings were assigned. Included in this group were former supervisors who had been recently demoted to Shipfitter and employees who had recently transferred to the shop from other shops or activities, and whose previous efficiency ratings therefore were not considered appropriate. It was not deemed necessary to request special official efficiency ratings for this group for reduction in force purposes because the reduction in

force program in process at the time contemplated and did separate from the rolls all Shipfitters, including Mr. Hilton, in the A–2 group. Therefore, even if the highest efficiency ratings had been assigned to the twenty-three employees it would not have been possible to retain them in the service as Shipfitters.

For your further information, the latest retention register of the Shipfitting Shop at the Charleston Naval Shipyard reveals that at the present time there remain no employees in the retention group A–2, that there are eleven employees in group A–1 plus, and that all of the other Shipfitters are listed in group A–1. All employees in the A–1 and A–1 plus subgroups have current efficiency ratings of "good" or better.

You are correct in all other assumptions outlined in your letter of 29 March.

Sincerely yours,

(s) M. E. ANDREWS,
Acting Secretary of the Navy.

U. S. GOVERNMENT PRINTING OFFICE 16-71048

BRIEF OF AMICUS CURIAE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 560.

EARLE W. HILTON, *Petitioner*,

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Amicus Curiae.

JOHN C. WILLIAMSON,
Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1947.

No. 560.

EARLE W. HILTON, *Petitioner*,

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.,
Respondents.

BRIEF OF AMICUS CURIAE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, IN SUPPORT OF RESPONDENT'S PRAYER FOR AFFIRMATION OF THE JUDGMENT OF THE COURT BELOW.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

I. Opinions Below.

The memorandum opinion of the District Court of the United States for the District of Columbia (R. 51-52) is not reported. The opinion of the United States Court of

Appeals for the District of Columbia (R. 53-56) is reported at 165 F. 2d 251.

II. Preliminary Statement.

The petitioners have filed herein a petition that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia, which affirmed a judgment in favor of the defendant-respondents entered by the District Court of the United States for the District of Columbia. This Court granted certiorari. The Veterans of Foreign Wars of the United States is desirous to support the prayer of defendant-respondents that the decision of the Court of Appeals for the District of Columbia be affirmed.

Counsel for the petitioner and the Solicitor General of the United States, as counsel for the defendant-respondents, have consented to the filing of this brief.

III. Statement of Interest.

This organization, the Veterans of Foreign Wars of the United States, whose members to the number of approximately two million of the former overseas members of the Armed Forces of the United States, who have fought our country's battles in all wars and officially recognized military and naval expeditions, on foreign shores and in hostile seas, speaking in their behalf, and feeling that it also expresses the wishes of all others who have been numbered among those who have suffered the economic and social dislocation incident to service in the cause of our country's honor and prestige and in the preservation of her democratic institutions, wish to inform the Court that our organization and these veterans, including the widows of those who have made the supreme sacrifice, are vitally and intensely interested and concerned in the issue involved in this case and its outcome as it affects them and the benefits which are theirs under the provisions of the Veterans Preference Act of 1944 (58 Stat. 387).

IV. The Facts.

The facts, as to which there is no dispute, are as follows: Petitioner was employed at the United States Navy Yard at Charleston, South Carolina, as a permanent employee in the classified Civil Service. On January 7, 1946, petitioner was demoted from the position of Shipfitter, Leadingman, at $12.08 per diem, to Shipfitter, with a maximum of $10.08 per diem. On November 8, 1946 he was furloughed without pay for a period of one year as a result of reduction of personnel in the Navy Yard. He had completed more than twelve years' continuous service and his efficiency rating was "Excellent"; and he was not entitled to preference on account of military service.

Petitioner was one of many employees furloughed because of reduction in personnel; and selection of the employees for furloughing was in complete accordance with the regulations promulgated by the United States Civil Service Commission, pursuant to the Veterans Preference Act of 1944. Other permanent employees with "good" or higher efficiency ratings with less service than petitioner, but entitled to military preference, were retained in employment.

V. The Issue.

The issues as found in the pleadings, exclusive of the specific harm or damage alleged to be suffered by the petitioner, is alleged to be, that the Civil Service Commission is without authority in law to issue the Rules and Regulations it did under the provisions of Section 12 of the Veterans Preference Act of 1944 (and known as the Retention Preference Regulations for use in Reductions in Force), and their action in this respect is unreasonable, arbitrary and capricious, without statutory warrant and contrary to the provisions of Section 8(c) of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. Appendix), and Section 12 of the Veterans Preference Act of 1944 (58 Stat. 390, 5 U. S. C. 861), in providing priority in retention to veterans as same is set out in said regula-

tions, paragraphs 12.301-12.302 and 12.303 et seq., 5 C. F. R. (1945 Supp.), 11 F. R. 6957, 8205, 9003, 9977, 12 F. R. 59.

VI. The Argument.

a. Retention of veterans in preference to non-veterans on reduction in force is consistent not only with language of Sec. 12, Veterans Preference Act of 1944, but with intent of Congress in approving said Act.

The numerous authorities cited by learned counsel for both petitioner and respondents in their respective briefs disclose that "veterans preference" is by no means a new development in this nation's approach to the problem of employment for its veterans; but on the other hand, by virtue of law, regulation, and Executive Orders, has been a continuous, developing and expanding process since approximately 1876.

The Veterans of Foreign Wars of the United States feels that the concept of "veterans preference" in federal employment has its genesis and development in the recognition by a grateful people, expressed through their representatives in the Congress, that service in the Armed Forces of the United States in times of war is an extraordinary albeit essential duty of citizenship; and that such service invariably manifests itself in an economic dislocation of the veteran from the normal processes of our competitive society.

"Veterans preference" in reduction-in-force in Government employment first manifested itself in the Act of August 15, 1876 ([illegible] Stat. 169; 5 U. S. C. 37), which provided as follows:

> In making any reduction of force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors.

From the enactment of the Act of August 15, 1876, *supra*, the attitude of the Congress and the President toward this

policy of veterans preference in reduction-in-force has been an ever-expanding one.

The Veterans of Foreign Wars of the United States has over a period of forty years applied itself diligently to the strengthening of the principle of veterans preference in appointment, and retention on reduction-in-force. The statutes and Executive Orders of the past thirty-six years bear testimony to the widening of this concept of veterans preference, and the unvarying intent of successive Congresses and Presidents to insure the veteran, not only a preference on appointment in the Government service, but on retention should the exigencies of economy in Government require a reduction in Government employment.

The legislative policy estalished in 1876 was first broadened by the Act of August 23, 1912 (37 Stat. 413) which contained a proviso as follows:

> * * * in the event of reductions being made in the force of any executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped or reduced in rank or salary.

Your attention is called to the Executive Order of the President issued under authority of the Act of August 23, 1912, *supra*, on October 24, 1921, being Section 7 of Order No. 3567, expanded March 3, 1923, by Order No. 3801, amending Civil Service Rule XII, extending preference in retention of veterans to the field service.

By Executive Order No. 4240, June 4, 1925, length of service was given some recognition, *but a veteran with efficiency rating good or better was preferred in retention regardless of length of service.* Only as against veterans with efficiency ratings lower than "good" was a nonveteran given a right to retention by reason of greater length of service.

In 1936 the regulations governing reductions of force were by direction of the President extended to Government positions which were not under the Civil Service sys-

tem. (Departmental Circular No. 146, U.S. Civil Service Commission, October 22, 1936).

From 1876 until the enactment of the Veterans' Preference Act of 1944, therefore, the Government had observed a continuous policy of granting to veterans with "good" or higher efficiency ratings absolute preference in retention in employment over nonveterans, without regard to length of service, under authority of various statutes, Executive Orders and administrative regulations.

With the approach of the recent conflict, and our eventual involvement therein, the question of the attitude of our Government towards the members of the Armed Forces, the economic and financial dislocation resulting from induction or enlistment, the economic effects of such dislocation during the aftermath of war when they had assumed the status of "veterans", was of great concern to those in both the executive, legislative and administrative branches of Government.

At the same time the question of revitalizing the pattern of "veterans preference" in Government employment was being developed aggressively by the leaders of the Veterans of Foreign Wars of the United States.

The net result of all this concern and attention was the presentation of what was known as H.R. 4115, 78th Congress, and its eventual enactment by Congress, and known as the "Veterans Preference Act of 1944", and it was in connection with said law that the regulation was issued about which the issue in this action was raised.

If there is any doubt as to the purpose and intent, by law, to give veterans preference in employment and retention in Government employment in preference to all other competing employees, a reading of the report of the Committee on the Civil Service of the House of Representatives should quickly dispel such doubt. House Report No. 1289 (to accompany H.R. 4115), 78th Congress, 2d Session, March 27, 1944, expresses the opinion of the Committee as follows:

> • • • The committee is of the opinion there should be put in one statute all provisions granting military preference in connection with civilian employment by the Government, in order that there may be statutory authority for the preference to be granted veterans in connection with appointment and retention in civilian positions.

The import of the testimony on the bill H.R. 4115, *supra*, and of the debate on the floor of the House of Representatives (90 Cong. Rec., Part 3, 3502-3505) is unmistakable that section 12 of the Veterans Preference Act was intended to continue in effect the practice of giving absolute preference in retention to veterans without regard to length of service, which retention policy had been in effect in the departmental service since 1912 and in the entire Government service since 1923.

It is our belief that no one accepting employment in a Government position, and who becomes a permanent employee, much less those in other categories, has a vested right in such position or one of equal status and pay.

Therefore, it is our contention that any one who enters the employ of the Government, does so with the full knowledge and understanding that the Congress, in giving him tenure in such employment as well as other advantages, may if it desires alter the law, to change, destroy and remove all protection and advantages theretofore granted.

Certainly every one entering the employ of the Government in the last thirty-five or more years cannot be heard to say he was not conversant with the policy of the Government in granting and providing preference to veterans in employment and retention therein.

An employee has no general and undefined right to retention in Government service solely by virtue of his civil service status. While Congress may limit and restrict the power of removal the normal rule is that, in the absence of any express contrary provision, the power of removal is incident of, and follows, the power of appointment. See

Wallace v. *United States*, 257 U.S. 541, 544; *Myers* v. *United States*, 272 U.S. 52, and cases cited.

If this is so, the matter at issue here resolves the question as to whether the Veterans Preference Act of 1944 grants absolute preference to veterans in retention in employment if their efficiency is good or better as compared to the nonveteran in any category covered by the Act, irrespective of length of service. We think the Act says so, and further, that is what it was intended to express.

Petitioner contends that the pertinent regulation on retention preference is void because absolute preference is given to veterans with permanent tenure, whereas the statute requires that due effect must also be given to length of service and efficiency ratings. This the Civil Service Commission has done by classification as to tenure, as between permanent employees, war service employees, and temporary employees; then within the above classifications are contained sub-classifications giving due effect to military preference and efficiency ratings. Within the sub-classifications due effect is given length of service.

If, as petitioner contends, the factor of length of service is given primary importance, then the factor of military preference would apply only as between veterans and nonveterans with equal length of service. To sustain such a contention would be to deny veterans all but the most paltry preference under the guise of a "Veterans Preference Act"; and "veterans preference", as over twenty million veterans have come to know the phrase, might henceforth well be re-phrased a "veterans mite". The contention of petitioners on this proposition is clearly untenable.

The statute requires only that the Civil Service Commission regulations give "due effect" to the above-named criteria. The requirement to give "due effect" does not imply that these factors should be weighed with an apothecary's scales so that the effect of one shall not fade in comparison with the effect of another. On the other hand it is

the bounden duty of the Civil Service Commission in applying the "due effect" provision to consider the object sought by the Congress in enacting the Veterans Preference Act. The "due effect" given length of service must necessarily be such as would be consistent with the over-all intent and purpose of the Congress in providing this unequivocal language in the second proviso of Section 12 of the Act as follows:

> * * * *Provided further,* That preference employees whose efficiency ratings are "good" or better *shall be retained in preference to all other competing employees* (italics supplied) and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings. * * *

The language of this proviso is unmistakable. However, in the face of this unmistakable language petitioner, nevertheless, requests the Court to substitute its evaluation of the relative weight to be applied the four statutory factors for that of the Commission.

b. The absolute preference accorded veterans for retention for one year following reemployment after World War II service is a valid exercise of authority granted the Commission under Sec. 8, Selective Training and Service Act of 1940.

The Congress in enacting the Selective Training and Service Act of 1940 appropriately concerned itself with the readjustment of the prospective inductees into the normal civilian processes of society when their period of service in the armed forces had been completed.

Appropriately enough the Congress in the language of Section 8 of the Act of 1940 made it mandatory that a Government employee who leaves his position to enter the military service shall upon discharge from the armed services be restored to his former position. Section 8(c) of the Act of 1940 further provides that the returning employee

"shall not be discharged from such position without cause within one year after such restoration."

The absolute retention rights of veterans for one year following discharge from the armed services is required by Sec. 8 of the Act of 1940 and the promulgating of the appropriate regulation for retaining these veterans in an unqualified retention status for one year was the only method by which the Commission could effectuate the provisions of the Act.

It is difficult to conceive how the Commission could have qualified this mandatory one year retention in the light of the clear and unmistakable language of the Act.

Petitioner contends that Section 8(c) of the Act of 1940 was repealed by implication upon enactment of the Veterans Preference Act. This contention is advanced in the face of the following language of Section 18 of the Act of 1944:

> Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

It is the firm belief of our organization that petitioner's contention represents a gross mis-evaluation of the intent of the Congress—that the Congress in the guise of enacting beneficial legislation for veterans in obtaining and retaining Government employment would at the same time repudiate a clear and unmistakable assurance made to them when they were inducted in to the armed services. The implication cannot be seriously advanced that the Congress on the one hand would tender assistance to the discharged veteran with respect to obtaining "new" Government employment, and with the other hand repudiating a previous pledge that he would be restored to his position in Govern-

ment service for one year, if he left that position to enter military service.

Petitioner relies on *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275; and *Trailmobile Company* v. *Whirls*, 331 U. S. 40, 56-57 to support his contention that a veteran had no right to absolute retention during the first year of employment following discharge from the service. The *Fishgold* case, *supra*, dealt with the return of a veteran to private employment, and the actual holding of the Court was that where the veteran was furloughed for short periods of time *pursuant to the terms of a union contract*, it did not violate the non-discharge provisions of Section 8 of the Act of 1940. However, the *Fishgold* case, *supra*, dealt with the question of seniority rights fixed by union contract; whereas the Commission's regulation covering the absolute one-year-retention group is based on a right fixed by statute.

In the *Whirls* case, *supra*, this Court limited its consideration to "sole question presented on the merits, namely, whether under section 8 the veterans right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues". This Court then proceeded with the question of the status of the veteran during the one-year absolute retention period: (The *Whirls* case, *supra*)

> There can be no doubt whatever that Congress intended by Sec. 8(c) to secure the "other rights" guaranteed by it for at least the minimum term of the prescribed one-year period. This indeed was a specific ruling of the *Fishgold* case.

It is respectfully submitted that if the Congress intended to secure the "other rights", i.e. seniority, insurance or other benefits, for one year, then surely the right of the veteran to be secure in his position for that period was of paramount consideration by the Congress. It would be

of small benefit to the veteran to be secured in his seniority rights for one year, if he were not secure in employment for that one-year period.

Petitioner contends that the Commission's regulation providing absolute one-year retention for veterans is invalid because it was promulgated under the assumption that this unqualified one-year retention was mandatory by virtue of Section 8 of the Act of 1940. Following the opinion of this Court in the *Fishgold* case, *supra*, and upon request of the Civil Service Commission, the Attorney General rendered an opinion that the absolute-one-year retention group was "valid and designed to effectuate the provisions of Section 8". (40 Op. Atty. Gen. No. 115, Sept. 20, 1946). Construing the language in favor of petitioner, it might well be that the Attorney General did not believe that this special retention group represented a mandate of the Congress. However, the regulation in question is no less appropriate, nor is its legal efficacy the less diminished, if it (regulation) exists in accordance with the discretion and judgment of the Commission, than if it existed by virtue of a direct mandate of the Congress.

The Court of Appeals, below, held that the retention-in-force regulations of the Commission were not unreasonable, arbitrary or capricious in these words:

> * * * We cannot say that this is an unreasonable method of applying the wholly general directives of the statute. We cannot, therefore, hold the regulations void.
>
> * * * We think that Congress left that difficult solution largely to the Commission, and so long as the Commission stays within the reasonable limits of the "due effect" directive the courts must leave it there.

In *The Background of Administrative Law* by Milton M. Carrow, published in 1948, we find (p. 155) under the heading "Scope of Judicial Review":

> Our system of government, politically as well as constitutionally, requires a check upon all official action,

be it legislative, judicial, executive, or administrative. One check upon administrative action is by means of appeal or review to the courts, as independent bodies. Acting as a check, of course, *does not mean the substitution of discretion or judgment, but simply the detection and suppression of arbitrary action.* (italics supplied)

This court has repeatedly held that the interpretation placed on a statute by the agency of the Government charged with its administration is entitled to great weight. See *Gray* v. *Powell*, 314 U. S. 402, 412-413, and *United States* v. *Jackson*, 280 U. S. 183, 193. In the below-mentioned three cases the Court has held that in the absence of patent error or arbitrary or capricious action administrative interpretations of long standing should not be lightly overturned by the Courts.

United States v. *Philbrick*, 120 U. S. 52,
United States v. *Hill*, 120 U. S. 169,
Robertson v. *Downing*, 127 U. S. 607.

If this Court decides that the retention regulations of the Commission are unreasonable, arbitrary or capricious, then this organization must conclude with no little dismay that its forty years of efforts in behalf of veterans, their widows, and the wives of our seriously disabled veterans, in this respect, are barren of result. This organization would then have grave doubts as to all expressions of policy and intention, as crystalized over a long period of years in practice by and through the use of what is clear and easily understood language as it appears in said Act, and which is without ambiguity of any sort and easily understandable.

In the light of the language of Sec. 12 of the Veterans Preference Act clearly expressing the intent and policy of the Congress and Government, we feel that the regulations here in question, promulgated by the Civil Service Commission governing reductions in force are within the Com-

mission's legal power and authority to issue, and that such regulations implemented the Act clearly and understandably in respect to the rights of veterans to retention in preference to all other competing employees in the service, under a reduction in force of Governmental employees.

The law and the regulations in question may be harsh, applied to any one situated as petitioner is, but the plight of the veteran who sustained the economic dislocation of war service is more so, and in the light of this service rendered the Government and his fellow citizens, we as an organization have always felt and practiced that, as respects Governmental employment, the concept of effective veterans preference in appointment and retention should be and is Government policy, and we conclude that such is the case in view of the law and attitude of governmental agencies, legislative, excutive and administrative.

VII. Conclusion.

For the foregoing reasons, we respectfully submit that the decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

VETERANS OF FOREIGN WARS OF THE UNITED STATES
Amicus Curiae

JOHN C. WILLIAMSON
Counsel.

April, 1948.

SUPREME COURT OF THE UNITED STATES

No. 560.—October Term, 1947.

Earle W. Hilton, Petitioner, *v.* John L. Sullivan, Secretary of the Navy, Frances Perkins, Harry B. Mitchell and Arthur Flemming, Members of the Civil Service Commission.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 1, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the relative rights of war veteran and nonveteran employees to retention in government service when a program of reduction in the number of government civilian employees makes it necessary for some to be chosen for discharge. The acute point of controversy is this: In the treatment of permanent tenure civil service employees, should qualified honorably discharged war veterans, merely because they are such, be retained in preference to nonveterans, even though those nonveterans have served the Government a substantially longer time than the veterans. The questions depend upon whether certain regulations promulgated by the Civil Service Commission are valid under a proper interpretation of controlling statutes.

The petitioner was for twelve years, from 1934 to 1946, a duly appointed permanent status civil service employee working in the Charleston Navy Yard. His work was of such high quality as to earn him an efficiency rating of "Excellent." By successive promotions, he arrived at the responsible position of Leadingman Shipfitter at a basic wage of $12.08 per day. January 7, 1946, shortly after the post-hostility reduction of governmental employees began, petitioner was demoted to a position paying $10.08 per day, as part of a reduction in force. This

demotion apparently was due in part to the fact that he did not have a veteran's preference. October 7, 1946, petitioner was notified that due to curtailment of work and funds it was necessary to eliminate certain positions in his competitive level and that in accordance with civil service regulations his name had been reached for action. He was told that, if he approved, he was then to be placed in a one-year "furlough status" rather than absolutely separated from service because it was hoped that conditions might justify his recall to duty within the year. He was also informed that his "active service" had already been terminated and that unless sooner recalled to duty he would be separated for reduction in force at the end of his one-year furlough period.

The civil service regulations said to require termination of petitioner's active service divide government employees into three main groups—A, B, and C. Group A, which has the highest priority for retention, is composed of "permanent employees"; groups B and C are composed of employees with limited tenures of employment. Group A is divided into five subgroups, the first three of which are of particular importance here. These three subgroups are:

> Subgroup A–1 Plus, [Veterans of World War II] for a one-year period after return to duty;
>
> Subgroup A–1, Veteran's preference employees with "good" (or higher) efficiency ratings;
>
> Subgroup A–2, Employees without veteran's preference with "good" (or higher) efficiency ratings.[1]

The result of these Commission groupings is that A–1 Plus veterans have the highest retention priority; A–1

[1] The remaining two subgroups of A, not involved here, are:
Subgroup A–3, Veterans with efficiency ratings lower than "good."
Subgroup A–4, Nonveterans with efficiency ratings lower than "good." 5 Code Fed. Reg. (Supp. 1945) § 12.303, now found in 5 Code Fed. Reg. (Supp. 1947) § 20.3 (a).

the second; and A–2, in which, not having a veteran's preference, petitioner is classified, has the third. Thus if these regulations are valid, every member of both Subgroup A–1 Plus and Subgroup A–1 must be retained in preference to petitioner.

After receiving notice of his one-year furlough, petitioner filed this complaint in district court for declaratory judgment, mandamus, and other relief. The defendants were the Secretary of the Navy and the members of the Civil Service Commission. The complaint charged that petitioner's demotion and furlough were the result of the Commission's regulations which prescribed retention priorities for veterans' preference employees in A–1 Plus and A–1 over all nonveteran employees without regard to the longer periods of service of some of the nonveteran employees, including petitioner. The failure of the Commission to consider relative length of service in establishing these retention priorities was charged to be "unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions" of applicable statutes. The petitioner's prayer was that the Commission's A–1 Plus and A–1 classifications be declared void, that the Secretary of the Navy be compelled to restore him to his original position as Leadingman Shipfitter, that the Commission be required to rescind the regulations and promulgate new ones in accordance with law, and that "such other and further relief as is just" be granted him. After answer and certain stipulations of fact, both parties moved for summary judgment and the government's motion was granted. The Court of Appeals for the District of Columbia affirmed. 165 F. 2d 251. Importance of the questions raised prompted us to grant certiorari. 333 U. S. —.

First. While admitting petitioner's right to challenge the validity of Subgroup A–1 in this action, the Government contends that he cannot challenge A–1 Plus. The premise of this argument is that, even if A–1 Plus were

invalid, the veterans grouped in it would fall within Subgroup A–1. We find no adequate support for this premise in the record. Veterans in Subgroup A–1 Plus could not qualify for A–1 unless they had efficiency ratings of "good" or better. But the language defining A–1 Plus includes veterans of all ratings, even below "good." And when the summary judgment in this case was rendered, 61 of the 118 veterans comprising A–1 Plus had not been rated at all. True, the Government asserts that 60 of these veterans have now been rated "good" and the sixty-first member has resigned. But the potential membership of Subgroup A–1 Plus is not limited to those veterans who were in it when the case was tried. The classification provides for a continuing status of preference of one year for all returning veterans who left government employment for war duty. There is no indication that additional war veterans qualified for classification under A–1 Plus will not return to Charleston Navy Yard and reclaim shipfitter jobs in preference to otherwise qualified nonveteran employees. And the Government does not claim that this classification has been repealed or altered so that in the future it can include only those veterans who have an efficiency rating of "good" or higher. Under these circumstances we are unable to say that all members of A–1 Plus could qualify or will be able to qualify as members of A–1. Therefore we cannot accept the government's contention that petitioner's likelihood of injury from A–1 Plus is too remote to justify his attack on it. If invalid, there is as much reason for his right to challenge this subgroup as for his right to challenge Subgroup A–1.

Second. The Government finds support for Subgroup A–1 Plus in § 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U. S. C. § 308. That section provides reemployment rights to any person who under that Act left a position other than a temporary

one in order to perform training and service in the armed forces and who satisfactorily completed his training. It further requires that upon appropriate application after release from training, such person, if still qualified to perform the duties of his old job and "if such position was in the employ of the United States Government, . . . shall be restored to such position or to a position of like seniority, status, and pay." Section 8 (c) also provides that a person so restored to his old position "shall not be discharged from such position without cause within one year after such restoration."

There appears to be little room for contention that there is ambiguity in the language that Congress selected to express its purpose to require the restoration of a former government employee who entered the armed forces to his old position and to give him the right to retention for a year. The language is that such an employee "shall be restored" to his position or to one like it, supplemented by language that he "shall not be discharged from such position without cause within one year after such restoration." We have examined the legislative history of the Selective Training and Service Act of 1940 and find nothing whatever which faintly suggests that Congress intended its language to be less mandatory than implied by the words it used. The command in § 8 (b) (A) that the Federal Government rehire its returning veteran employees contrasted sharply with the requirement in § 8 (b) (B) that a private employer need not reemploy such a veteran when "the employer's circumstances have so changed as to make it impossible or unreasonable to do so." This difference was noted by the congressional sponsors of the 1940 Act, who thought that the Federal Government should set an example to private industry by providing jobs for all returning veteran employees.[2]

[2] Hearings before House Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess. 80–82, 118, 235; 86 Cong. Rec. 11697.

Congress, having thus provided that the veteran who left a government job must be reemployed, also required his retention by declaring that he should not be discharged within a year without cause.

Petitioner contends, however, that this Court's interpretations of § 8 (b) (B) and § 8 (c) in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, and in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275, require a holding that the regulations establishing A–1 Plus are invalid. The *Trailmobile* case dealt only with the obligations of a private employer to veterans after the first year of their return to his employment, and our holding there is of no relevance here. In the other case, Fishgold, following his discharge from the armed forces, had been restored to his old position by his former private employer. Within one year thereafter temporary layoffs became necessary on each of nine days. Fishgold was laid off while nonveterans with longer service were continuously kept at work in accordance with a collective bargaining agreement which required that "decreases" in the working force be based primarily upon "length of service." This Court held that since Fishgold's layoffs were temporary, he still retained an employment relationship, and thus had not been "discharged" within the meaning of § 8 (c). The statute was held not to require that when slack work compelled a private employer to lay off some workers temporarily a veteran restored to his job be given continuous work for one year after his reinstatement in preference to other nonveteran employees who under the terms of company employer-employee contract were entitled to such work by reason of their greater "length of service."

There are several reasons why we cannot accept petitioner's argument that the *Fishgold* case requires the invalidation of the A-1 Plus classification. In the first

place, we are here concerned with the one-year retention rights of veterans restored under § 8 (b) (A) to their old jobs with the Federal Government, not, as in the *Fishgold* case, with the rights of veterans restored to jobs in private industry under § 8 (b) (B). We have previously pointed out that Congress in § 8 (b) (A) imposed a mandatory and unconditional reemployment obligation upon the Federal Government; in other words the section guaranteed that a returning veteran would get back his job with the Government. But § 8 (b) (B) imposed no such unconditional guarantee that a returning veteran would be reemployed by his former private employer. For that subsection does not require restoration of returning veterans to their former private jobs "if the employer's circumstances have so changed as to make it unreasonable or impossible" to rehire him.

Thus Congress, evidently considering that there were significant differences in industrial and governmental employment practices and potentialities, imposed obligations to rehire returning veterans of a markedly different nature upon government and private employers. It did not define the "unreasonable or impossible" circumstances that might relieve a private employer of the duty to rehire veterans, nor need we attempt to do so now. But it is plain that such circumstances might conceivably be such as seriously to affect, not only the reasonableness and possibility of rehiring, but also the reasonableness and possibility of retaining him for a full year's continuous work. For this reason, among others, interpretation of § 8 (c)'s prohibition against discharge of a returning veteran must be made in light of whether he returns to a government-guaranteed or to a private non-guaranteed job. Therefore § 8 (c)'s prohibition against "discharge" by a private employer cannot be accepted as determinative of the scope of the congressional prohibition against "discharge" by the Government.

The foregoing distinction is illustrated by the fact that civil service workers, unlike the private employees in the *Fishgold* case, are not confronted by a situation in which their employer, the Government, has an outstanding contract with them providing that they shall be retained in service in proportion to their "length of service" as reductions in force become necessary. Whatever seniority rights government employees have when discharges or reductions in force are made depend entirely upon congressional acts and regulations issued in harmony with them. See 37 Stat. 555, 5 U. S. C. § 652. We have discovered no acts or regulations which can be construed to recognize a nonveteran's length of government service as a factor sufficient to override the requirement of § 8 (b) (A) and § 8 (c) that a veteran must be restored to his old job with the Federal Government and cannot be discharged therefrom without cause for one year. Thus, unlike the employees in the *Fishgold* case whose private-employment contract-derived seniority prevented their being laid off, petitioner has no comparable statutorily derived seniority rights to his job with the Government. Petitioner argues, however, that § 12 of the Veterans Preference Act of 1944, 58 Stat. 390, 5 U. S. C. § 861, in effect amended § 8 and conferred retention rights upon him based upon his length of service. For the reasons we give below in discussing the validity of Subgroup A–1, we think this contention is without merit.

Finally, the *Fishgold* decision held only that a temporary layoff did not violate a veteran's right under § 8 (c) not to be discharged without cause for one year after he had been restored to his old job. Here the petitioner asserts that the statutory one-year prohibition against discharge confers upon a reemployed veteran no security from a furlough for one year without pay, that such a furlough is not a "discharge" within the meaning of

§ 8 (c). The Commission has here treated a furlough of more than thirty days as the equivalent of a discharge. This is in accordance with prior governmental practice which has considered that the furlough of a veteran with military preference violates regulations providing that he shall not be "discharged or dropped" when "reductions in force are being made."[3] Moreover, § 14 of the Veterans Preference Act, which safeguards preference eligibles against administrative denial of their preference rights, specifically places furloughs and suspensions for more than thirty days without pay on the same basis as discharges. Thus, the common meaning of furlough in governmental practice is not the same as that which the Court in the *Fishgold* case found to be the meaning of "layoffs" and "furloughs" in "industrial parlance." To give this one-year "furlough" any less meaning than the statutory word "discharge" would result in depriving government employee veterans of the entire congressional guarantee of a year's retention in their old jobs. We hold that the furlough, if applied to veterans, would be a "discharge" within the meaning of § 8 (c). Consequently, the Commission acted within its statutory duty by providing veterans a preference against such removals by establishing Subgroup A–1 Plus.

Third. Petitioner strongly urges invalidity of Subgroup A–1, which gives all permanent employee "Veterans with 'good' or higher efficiency ratings" retention preferences over all nonveterans, even over nonveterans with higher efficiency ratings and longer government service. While conceding that under some limited circumstances veterans with "good or higher ratings" are granted preference by § 12 of the Veterans Preference Act of 1944, petitioner argues that the section does not require but actually

[3] See 40 Ops. Att'y Gen. 115 (Sept. 20, 1946) 7, referring to Opinion, Attorney General Mitchell in 1929, interpreting Executive Order 5068, March 2, 1929. The substance of that Order is set out in this opinion at p. 13.

prohibits any preference for veterans over nonveterans which fails to give substantial weight to a nonveteran's longer government service. The Government urges that the section requires an absolute retention preference for veterans who have the required efficiency ratings without regard to the fact that nonveterans may have had longer government service. An alternative argument is that, whether absolutely required or not, the Commission's subgrouping is well within the power to promulgate "rules and regulations" specifically authorized by § 12. The question presented is therefore one of interpretation of the relevant language of § 12.

The part of the section on which petitioner particularly relies reads:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service . . ."

Petitioner interprets this portion of § 12 as a congressional command that the Commission must invariably give "due effect" to length of service in determining what employees, whether veterans or nonveterans, shall first be discharged in a reduction-of-force program. In effect he argues that the above language provides no other "military preference" in civil service for a veteran employee over a nonveteran with greater "length of service" than that defined in the above proviso, namely, that the length of a veteran's army service shall be credited in computing the length of his total government service.

The part of § 12 on which the Government supports the Commission's recognition of a veteran's absolute retention preference without regard to comparative length of service of veterans and nonveterans follows immediately after that section's language on which petitioner relies, and reads:

> ". . . *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings. . . ."

The Government interprets this proviso as a special withdrawal of the proviso-defined classes of veterans from the general terms of the first clause of § 12 relating to "length of service." It views this proviso as the congressional creation of classes of veterans' "preference employees"[4] who "shall," if they have the defined efficiency ratings, "be retained in preference to all other competing employees" without regard to length of service as between veterans and nonveterans. Thus, under the government's interpretation, length of service would be given the "due effect" required by the first clause of § 12 by its consideration in the determination of retention preferences as between veteran and veteran and as between nonveteran and nonveteran. This interpretation of the proviso and the section, it is argued, would give meaning to all the language used in them, is plainly called for by the language, and harmonizes this portion

[4] The Act not only provides preferences for veterans but under certain circumstances grants preferences to veterans' wives, widows and mothers. § 2, 5 U. S. C. § 851, as amended by Pub. L. No. 396, 80th Cong., 2d Sess. (Jan. 19, 1948). See H. R. Rep. No. 1289, 78th Cong., 2d Sess. 3.

of the Act with all its other parts and with the Act's broad purposes. The interpretation is compelled, so the Government argues, by the Act's legislative history, particularly when the proviso and preceding clauses in the section are viewed in the light of a long series of prior congressional enactments and authorized executive orders granting preferences in government employment to veterans and their close relatives. We agree with the Government that in the light of the foregoing factors no other interpretation of the pertinent parts of the section can fairly be reached.

In 1876, seventy-two years ago, Congress passed a law which required any executive department when making "any reduction of force" to "retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors." 19 Stat. 143, 169; 5 U. S. C. § 37.[5] In 1912 Congress greatly strengthened the old 1876 policy by providing that "in the event of reductions being made in the force in any of the executive departments, no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary." 37 Stat. 360, 413.[6] There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably

[5] Disabled veterans had been granted employment preferences in 1865. 13 Stat. 571. This statutory policy was expressly preserved by § 7 of the Civil Service Act of 1883, 22 Stat. 403, 406, was carried forward in other Acts, and has been repeated in a most comprehensive manner in § 2 of the Veterans Preference Act of 1944.

[6] It is of interest that this legislative expression, like the one before us, was a proviso in a section, and that the section as a whole had to do with the manner in which the Civil Service Commission should provide for efficiency ratings in relation to promotions, demotions and dismissals of civil service employees.

discharged veteran government employee with a rating of "good." Length of service in no way qualified the preference given the veteran. And subsequent executive orders not only recognized this provision as giving veterans an absolute preference, but also extended the preference to veterans in the field service [8] and to positions not under civil service.[9]

Executive Order 4240 of June 4, 1925, as amended by Executive Order 5068 of March 2, 1929, provided, as does Subgroup A–1 here, an absolute retention preference for veterans over nonveterans where the veterans' efficiency ratings were "good," and a similar absolute preference over nonveterans whose ratings were less than good if the veterans' ratings were equal to those of the nonveterans. And at the time of passage of the Veterans Preference Act of 1944, there were 1943 Civil Service Regulations outstanding [10] which granted veterans with permanent tenure and with a rating of "good" or higher, precisely the same absolute retention preference over nonveterans which is now afforded by Subgroup A–1, here attacked as invalid. Consequently, a holding that veterans with a rating of "good" no longer have a retention preference over nonveterans with longer service, would mean that passage of the Veterans Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government

[7] § 7, Executive Order 3567, October 24, 1921.

[8] Executive Order 3801, March 3, 1923.

[9] Departmental Circular 146, U. S. Civil Service Comm'n, October 22, 1936.

[10] 5 Code Fed. Reg. (Supp. 1943) §§ 12.301–12.313. These regulations, like those attacked here, separated all civil service employees into different categories according to their tenure, with permanent employees having the highest retention status. Thus all permanent employees, regardless of veteran's preference and of efficiency rating, enjoyed priority over all employees with limited tenures.

personnel. The purpose of that Act's sponsors and of Congress in passing it appears to have been precisely the opposite—to broaden rather than narrow the preference.

The Senate Civil Service Committee was told by the congressional sponsor of the measure that "this bill takes away no existing veterans' preference, either by statute or Executive order, but it does strengthen, broaden and implement the veterans' preference policy heretofore in effect," and that it would "give legislative sanction to existing veterans' preference, to the rules and regulations in the executive branch of the Government. . . ." [11] A member of the Civil Service Commission in explaining the bill to the Senate Committee called the proviso here involved the "heart of the section," [12] and stated that it "was substantially the same" as the 1912 Act,[13] which as before pointed out, provided for an absolute veterans' retention preference without regard to length of service.[14] And in explaining the Bill on the floor of the House, the

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[11] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8–9.

[12] *Id.* at 29.

[13] *Id.* at 27, 29.

[14] Three veterans' organizations collaborated with the legislative sponsors in drafting the Act. Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 8. A representative of one of these organizations stated to the Committee: "This measure gives to honorably discharged veterans of World War I and World War II, their widows, and the wives of disabled veterans who themselves are not qualified, preference in employment where Federal funds are disbursed. It provides, by law, a definite preference both in appointment and retention in Federal positions. While such a preference in many instances now exists by virtue of Executive orders and Civil Service Commission regulations, this bill gives such preference a permanent standing that cannot be changed

sponsor and active proponents of the measure explained it as strengthening and broadening veterans' preferences then embodied in statutes and executive orders.[15]

Not only did the friends of the Veterans Preference Act explain to the Senate Committee on Civil Service and to the Congress the broad preferences the Act would grant. Hostile witnesses graphically pointed out to the Senate Committee what they deemed would be the unfairness of the Act's effect if passed as written. One such witness representing the Civil Service Reform League said: "I think you ought to give consideration to . . . retention of veterans in civil service regardless of length of service. I do not think it is fair, a veteran be retained in service who has been in the service 6 months as against a person who has been in the service 25 years. I believe some distinction might be made, otherwise you would do a grave injustice to those people who have long years of service in civil service." [16] And another witness against the Bill pointed out that under it nonveterans would "be the first to be laid off and the last to be taken on." [17]

Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a

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except by congressional action. The bill, likewise, does not take away from the veteran any rights previously granted under any existing law, Executive order, civil-service rule, or regulation of any department of the Government, but prescribes by law additional preferences and confirms many now existing by regulation." *Id.* at 41–42.

[15] 90 Cong. Rec. 3502, 3503, 3505.

[16] Hearings before Senate Committee on Civil Service on S. 1762 and H. R. 4115, 78th Cong., 2d Sess. 33–34.

[17] *Id.* at 63, 65.

policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy.[18]

Affirmed.

[18] It is worthy of note, however, that Congress, in recognition of hardships resulting from replacement of older government employees by veterans, has passed Acts which grant special pensions to employees over 55 years of age who have worked for the Government for 25 years or more and who have been involuntarily separated from the service in reductions in force. 60 Stat. 939; Pub. L. No. 426, 80th Cong., 2d Sess. (Feb. 28, 1948). See 90 Cong. Rec. 9201–9202, H. R. No. 2443, 79th Cong., 2d Sess. 1, S. Rep. No. 1678, 79th Cong., 2d Sess. 1–2.

SUPREME COURT OF THE UNITED STATES

No. 560.—October Term, 1947.

Earle W. Hilton, Petitioner,
v.
John L. Sullivan, Secretary of the Navy, Frances Perkins, Harry B. Mitchell and Arthur Flemming, Members of the Civil Service Commission.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[June 1, 1948.]

Mr. Justice Reed, concurring.

I agree with the conclusion reached by the Court in this case. My disagreement with the opinion is limited to that portion of subdivision *Second* which indicates that the rights of a veteran as to discharge after restoration to employment by the United States differ from the corresponding rights of a veteran restored to employment by a private employer.

The rights to retention of employment of both veterans are governed by the same subsection 8 (c). 54 Stat. 890. Section 8 (c) specifies the same conditions for retention of employment for all employees whether they are re-employed by the United States or by private employers.

Nothing has come to my attention that indicates to me a congressional purpose to grant to one more rights as to continuity of employment than to the other. The legislation as to both depended upon the same constitutional authority—the War Power. I can see no reason to attribute to Congress an intention to guarantee public employment to a returning veteran regardless of the needs of the public service or to discriminate between equally deserving veterans. Compare *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275.

Mr. Justice Frankfurter and Mr. Justice Jackson join in this opinion.

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[June 1, 1948.]

Mr. Justice Rutledge, concurring.

I concur in the result. But I do so without expressing opinion concerning the validity of Subgroup A–1 Plus of the Regulations. That classification, as I understand it and the Court's construction of it, gives preference for retention for one year in governmental work to veterans of World War II over all others, including veterans of World War I, regardless of efficiency and length of service whether of the restored veteran or of his competitors. It may be that upon the sum of the legislation Congress intended to give so broad a priority to returning members of the military services. But if so, it is the one instance in which both efficiency and length of service have been absolutely disregarded. And it is at least possible, I think, to read the complex series of statutes bearing on the problem as not having been intended to go so far.

But I do not reach that question, because Subgroup A–1 does take account of efficiency. It gives preference to veterans unless their efficiency rating is less than "good." No specific mention of length of service is made. But while a classification which ignores all considerations both

of efficiency and of length of service might be found unauthorized under the statutory scheme,[1] one which takes due account of efficiency, which is not wholly unrelated to length of service, well might be sustained. And in that event the Commission's judgment that veterans with efficiency ratings of "good" or better should be preferred to all others could hardly be called arbitrary or in excess of the authority conferred.[2]

It is true that when petitioner was separated from service there were some 61 veterans classified A–1 Plus, without efficiency ratings and in priority to himself.[3] But we are informed, and it is not disputed,[4] that 60 of these men now have received efficiency ratings of "good," and

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[1] Depending upon whether § 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. App. § 301, requiring restoration to employment and forbidding discharge without cause for one year, has been qualified by the later enactment of § 12 of the Veterans' Preference Act, 58 Stat. 390, 5 U. S. C., Supp. 1946, § 861, quoted in the Court's opinion, particularly the second proviso. See note 2.

[2] The second proviso, cf. note 1, specifies that preference employees (*i. e.*, veterans) with efficiency ratings of "good" or better shall be retained in preference to "all other competing employees," a designation certainly of the most comprehensive scope. The very terms of the section appear thus to place much greater stress upon efficiency ratings than upon length of service.

[3] The practice in relation to these positions has been to withhold efficiency ratings, in this case, for a period of six months, and then to award them on the basis of actual performance.

[4] Ordinarily, of course, rights are to be determined as of the time the interests involved are adversely affected. But it would seem hardly consistent with the legislative scheme that employees with deferred status could defeat the use of a reasonable period to determine the veteran's efficiency rating by actual performance. In any event, the discretionary declaratory judgment remedy should not be applied to oust preference employees entitled to priority over others, even though their status as preference employees is established after trial but before final disposition of the cause on appellate review.

therefore fall into Group A–1 in any event. The other of the 61 has resigned. Hence we are told, and this also is not disputed, that any order of the District Court purporting to require petitioner's restoration would mean that he is entitled to displace one of those veterans.

Since in my view Regulation A–1 is valid, regardless of whether A–1 Plus should stand, and since on the facts now before us Regulation A–1 is sufficient to exclude petitioner from restoration at this time, I do not think he has made a sufficient showing to call forth the exercise of our discretionary power in this proceeding to require the Commission to reformulate the Regulations. Upon the showing made the case is not one appropriate, in my judgment, for application of the discretionary remedy of a declaratory judgment.